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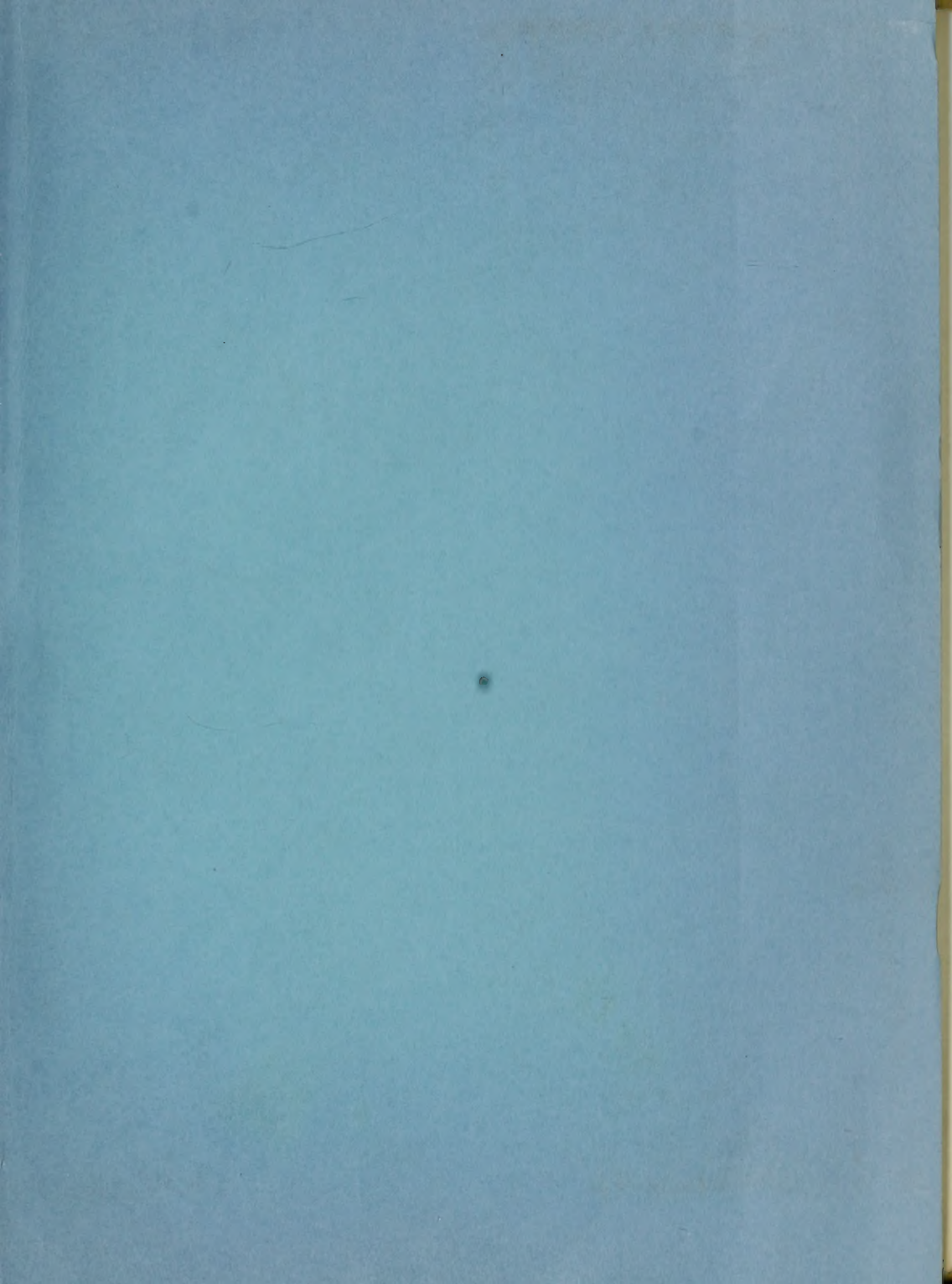
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Nos. 20832, 20833 and 20834

In the
United States Court of Appeals
For the Ninth Circuit

JACK ROBERSON and WILLIAM RODGERS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 20832

UNITED STATES OF AMERICA,
Appellant,

vs.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellee.

No. 20833

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 20834

Opening Brief of Appellants,
Roberson and Rodgers

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Opening Brief of Appellants,
Roberson and Rodgers

(For convenience, the individual parties will be referred to by their last names. Appellants will be referred to as "Roberson" and "Rodgers", respectively, and Appellee, the

United States of America, as "the Government". The transcript of record will be noted "T.R." and the transcript of proceedings "T.P.")

JURISDICTION

This action originated in the United States District Court for the District of Arizona. Jurisdiction was established under 28 U.S.C.A. § 1346(b), § 2674 and §2671. At the end of plaintiffs' case on Saturday, October 22, 1965, the lower court ordered judgment for the defendant the United States Government (T.R. 74). Plaintiffs further appeal from Amended Findings of Fact and Conclusions of Law and Judgment dated the 29th day of November, 1965 (T.R. 52).

Roberson and Rodgers then instituted this appeal pursuant to Rule 73 of the Federal Rules of Civil Procedure (T.R. 58) 28 U.S.C.A., § 1291, which grants to this Court jurisdiction to review the Judgment, Findings of Fact and Conclusions of Law of the lower court.

STATEMENT OF THE CASE

Proceedings in Lower Court.

On July 17, 1964, plaintiffs Roberson and Rodgers filed a complaint for personal injuries against the Government (T.R. 1) pursuant to the provisions of § 1346(b) and § 2674 of Title 28 of the United States Code (Cause Civ.—922 Pct.) in the United States District Court in and for the District of Arizona (Phoenix, District No. 2). The Government filed its answer on October 2, 1964 (T.R. 9). On the 21st day of January 1965, the Government filed a Third Party Complaint (T.R. 13) against Merritt-Chapman & Scott Corporation, third party defendant, alleging in general that if liability for the injuries alleged in plaintiffs' complaint be adjudged against defendant-third party plaintiff then the third party plaintiff would be entitled to full

indemnity from third party defendant. Merritt-Chapman & Scott Corporation, third party defendant, filed its answer to third party complaint on March 12, 1965 (T.R. 18).

On July 21, 1965, the defendant and third party plaintiff, United States of America, moved the court for summary judgment coupled with a motion, notice, and memorandum of law (T.R. 22), basing said motion on the ground that the United States of America had no duty to protect the plaintiffs and that the plaintiffs, by the very nature of their work, should have protected themselves and the defendant. Government is bound to afford plaintiffs no protection and further "even though the defendant Government maintained the accident prevention program, this did not create a duty or obligation to care for the plaintiffs". The Government also filed an alternative motion that the defenses raised by third party defendant should be stricken as insufficient on the ground that defendant, Merritt-Chapman & Scott Corporation is liable to the Government both on the theory of implied warranty and on the express indemnity stated in the contract between the United States Government and Merritt-Chapman & Scott (T.R. 22).

After extensive oral argument on the motion for summary judgment, the court ordered that the motion of defendant United States of America for summary judgment *be denied* and further ordered that the United States of America's alternative motion to strike those pleadings of third party defendant designated as additional defenses is granted (T.R. 74).

A pre-trial conference was held on September 16, 1965, and on September 23, 1965, the lower court entered its pre-trial order (T.R. 32). On October 21, 1965 the case came on for a non-jury trial, whereupon the plaintiffs presented their case through October 23, 1965. At the conclusion of plaintiffs' evidence, on October 23, 1965, counsel for defend-

ant United States of America moved for judgment in favor of the defendant United States of America. The court rendered an opinion from the bench immediately after defendant's motion, holding in essence that there was no liability on the part of the United States of America under the provisions of the Federal Tort Claims Act for the reason that "there being no duty here on the part of the United States Government, there can be no breach of a duty, and thus no liability, under the provisions of the Federal Tort Claims Act.", and further that there was no liability by the third party defendant to the third party plaintiff, and further ordered that judgment be entered accordingly.

The defendant United States of America on November 3, 1965, lodged its proposed Findings of Fact and Conclusions of Law (T.R. 36). The plaintiffs' Objections to Proposed Findings of Fact and Conclusions of Law were filed on November 12, 1965 and on November 22, 1965 third party defendant Merritt-Chapman & Scott requested modifications of proposed Findings of Fact and Conclusions of Law (T.R. 48).

On November 29, 1965 the Findings of Fact and Conclusions of Law were entered (T.R. 52). On the same day judgment that the complaint herein be dismissed on the merits and that each party bear its own costs was entered (T.R. 56).

On December 6, 1965, a filing of the amended judgment was made (T.R. 57). Plaintiffs Roberson and Rodgers filed their notice of appeal on December 21, 1965 (T.R. 58). Defendant United States of America filed its notice of appeal January 25, 1966 (T.R. 65). The third party defendant filed its Notice of Cross-Appeal on February 1, 1966 (T.R. 66).

SPECIFICATIONS OF ERROR RELIED UPON

1. The Court erred in granting defendant United States Government's Motion to Dismiss Plaintiffs' Complaint for

the reason that the Complaint stated a valid cause of action which was fully supported by all of the relevant and competent evidence before the Court, and there was no evidence contradictory thereto.

2. The Court erred in refusing to consider the evidence most strongly in favor of the plaintiffs for the reason that none of the evidence presented by the plaintiffs was refuted in any respect by the defendants, who presented no evidence whatsoever.

3. The Court erred in refusing to consider that the United States Government did assume and did undertake the entire control and regulation of the safety program on the Glen Canyon Dam for the reason that evidence presented by the plaintiffs shows that the entire safety and inspection program was regulated and controlled solely by the defendant United States Government.

4. The Court erred in refusing to consider that if the United States Government assumed complete control of the safety program, and by doing so increased the dangers and hazards to the plaintiffs, that such a negligent performance created liability for the reasons that this is a true expression of the substantive law of Arizona, which is the law to be applied in this case, and is fully supported by the evidence presented by plaintiffs and entirely unrefuted by the defendants.

5. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the evidence presented by the plaintiffs clearly shows that the defendant United States Government maintained such control over the employees of the third-party defendant contractor, Merritt-Chapman & Scott, so as to control the method or manner in which they performed their work in relationship to safety so as to be able to directly order said employees to change the method or

manner of working which the United States Government inspector believed to be unsafe, or to cause the machinery used by the employees of the third-party defendant, Merritt-Chapman & Scott to be changed when the United States Government inspector considered it to be defective, and further, that retention of this control was negligently exercised by the defendant United States Government, proximately causing the injuries sustained by the plaintiffs.

6. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the defendant United States Government interfered with the work being performed by the employees of the third-party defendant contractor Merritt-Chapman & Scott in such manner so as to cause the employees to rely on the defendant United States Government's safety inspection rather than to do their own inspection, and that because of such interference by the defendant United States Government, which was performed in a negligent manner, plaintiffs were proximately injured by such negligence.

7. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the defendant United States Government caused its premises on which the construction work was being performed to be of such a dangerous condition, of which it had knowledge or should have had knowledge through the exercise of reasonable care, and that the negligence of the defendant United States Government in permitting a dangerous condition to exist on its premises was the proximate cause of plaintiffs' injuries, all which is clearly shown by the evidence presented by the plaintiffs and unrefuted by the defendants.

8. The Court erred in making and entering Conclusion No. 3, to the effect that the defendant United States Government did not have a duty, under the contract, to inspect the

premises under construction, and that because there was no duty owed to plaintiffs by the defendant United States Government, there could be no breach of a duty, and thus no liability under the provisions of the Federal Tort Claims Act, for the reason that the Court refused to consider the evidence which established a voluntary assumption of the duty to inspect by the defendant United States Government, which duty was relied upon by the plaintiffs, and which duty was negligently exercised by the defendant United States Government, thus creating a valid cause of action under the applicable laws of the state of Arizona by the plaintiffs against the defendant United States Government, which law controls in this action.

9. The Court erred in refusing to consider and hold that after the defendant, United States Government, undertook to regulate the safety program on Glen Canyon Dam, that the defendant must perform its "Good Samaritan" task in a careful and proper manner, which it failed to do, but instead performed said task in a negligent manner, for the reason that the "Good Samaritan" doctrine is the law in the state of Arizona, which law is controlling in this action, and that the evidence presented by the plaintiffs, and completely unrefuted by the defendant, United States Government, clearly establishes a cause of action based on the "Good Samaritan" doctrine.

10. The Court erred in refusing to consider that one who gratuitously assumes control and renders services to another is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise such competence and skill as he possesses in performing his duty voluntarily assumed, for the reason that under the law of Arizona, which is the controlling law in this action, such a cause of action exists, and further, that the Court erred in

refusing to allow recovery by the plaintiffs against the defendant Government under this law for the reason that the evidence presented by the plaintiffs, and completely unrefuted by the defendant Government, clearly establishes a cause of action based on said doctrine.

11. The Court erred in refusing to hold that the defendant United States Government, in view of the evidence presented by the plaintiffs, and unrefuted by the defendant, assumed a duty to inspect and control the operation of an inherently dangerous work platform 532 feet above the Colorado River, but negligently performed its duty, although it controlled the safety program and maintained full time safety inspectors and engineers on the job who knew, or should have known, the existing dangers, which duty could not be delegated, and that such negligence was the proximate cause of the injuries sustained by plaintiffs.

12. The Court erred in refusing to consider that the defendant United States Government, as owner of the Glen Canyon Dam, owed a duty to furnish employees of an independent contractor a safe place to work when hazardous and inherently dangerous conditions were present, for the reason that the evidence presented by the plaintiffs, and entirely unrefuted by the defendant, clearly shows that said duty was owed by defendant to plaintiffs, that the work was hazardous and inherently dangerous, and that the defendant was negligent in performing its duty, which was the proximate cause of the injuries sustained by plaintiffs, and that under the law of the state of Arizona, which law is to be applied in the instant action, plaintiffs may recover from defendant for said negligent performance of said task.

13. The Court erred in refusing to admit in evidence the Manual of Accident Prevention In Construction, (Exhibit

No. 15) for the reason that said text showed the standard of care that should have been employed by the defendant; that said text was utilized by the defendant United States Government in its safety program and was the recommended text in establishing safe practices for construction work, and further, under the Arizona law, which is to be applied herein, said documents are admissible for the purposes stated.

14. The Court erred in making and entering Conclusion No. 5, to the effect that plaintiffs, and each of them, as employees of the independent contractor, Merritt-Chapman & Scott Corporation, were within the provisions of the Arizona Workmen's Compensation Law, for the reasons that the Arizona Revised Statutes, § 23-1023 (as amended 1965) expressly provides that an injured workman may take compensation under the Workmen's Compensation Act and also sue for recovery against a third party responsible for his injury, the only pertinent limitation being that in the event of a recovery the employer shall be entitled to be subrogated to or have a lien against such recovery to the extent of his payments to the injured workman, and for the further reason that the plaintiff, and each of them, have complied with said statute, thus being permitted to bring this third party action against defendant United States Government.

15. The Court erred in amending the proposed order for the judgment, and amending its judgment, without finding as a fact, that if it were necessary for the Court to determine the question of contributory negligence of the plaintiffs, and reach a conclusion in this respect, that it would conclude that the plaintiffs were guilty of contributory negligence in working on the jumbo, without the use of safety belts, for the reasons that there was absolutely no evidence presented in plaintiffs' presentation of the evidence that the

failure of the plaintiffs to wear safety belts was negligence, but rather that it was customary, proper, necessary, and safer not to wear same while working on the jumbo, nor was there anything to even attach safety belts to, since the handrails and hook-on rails had been removed and never replaced, and that safety nets had always been used to afford protection and mobility while on the jumbo; further, that this defense is not available under the hazardous occupations statutes of Arizona, A.R.S. §§ 23-805; further, that the proximate cause of the injuries sustained by the plaintiffs was conclusively shown by the evidence to have been the faulty inspection and lack of enforcement of safety requirements by the defendant United States Government, and not the failure of the plaintiffs to wear safety belts while working on the jumbo.

16. The Court erred in making and entering Finding of Fact No. 5 to the effect that the slip of the jumbo was caused either by the improper setting of an anchor pin for the jumbo or by the inadequate strength of the pin, for the reason that the evidence conclusively proves that the overall rigging of the jumbo was faulty, causing the jumbo to slip, rather than merely the improper setting of the anchor pin or the inadequate strength of the pin as being the proximate cause.

17. The Court erred in refusing to admit in evidence plaintiffs' Exhibit No. 10 for identification, to wit: the position description of the United States Government Safety Inspector, Richard M. Blake, for the reason that said Position Description, which is an explanation of the Safety Inspector's duties, expressly showed that the government had assumed the obligation to supervise the inspection of the "unsafe working practices or inadequate construction devices such as unsecure ladders, loose or weak scaffolds and disorderly housekeeping," and which document would

have shown that the defendant, the United States Government, voluntarily, *and actively*, assumed the duty of inspection to discover defective equipment used by the general contractor, negligently exercising such duty, and thus proximately causing the injuries sustained by the plaintiffs, all of which should have been considered with Exhibits 11 and 12 in evidence, which are safety inspector Blake's daily safety activity reports.

18. The Court erred in holding that the United States Government was not liable, which is not justified by the evidence, and is contrary to law and is made and based upon a mistake of the law applicable to the evidence in this cause.

19. The Court erred in entering judgment for the defendants after the conclusion of plaintiffs' case for the reason that the liability of the defendants was clearly shown by the evidence presented by plaintiffs, in view of the applicable Arizona substantive law, which is the controlling law in the instant action, and further, for the reason that the defendants presented no evidence to refute that presented by the plaintiffs.

Facts:

This is an appeal by plaintiffs below, Jack Roberson and William Rodgers, both laboring ironworkers who on April 15, 1964, were severely injured when a four (4) level twenty-two (22) ton moveable work scaffold commonly known as a "jumbo", fell while suspended 532 feet above the Colorado River in the west diversion spillway of the Glen Canyon Dam at Page, Arizona. Some seven years prior to the date of the accident of April 15, 1964, the United States of America, by and through the Bureau of Reclamation, had caused the Glen Canyon Dam to be under construction

upon its premises. The Government, as owner of the premises, contracted with Merritt-Chapman & Scott to build said dam.

At the time of the accident in question the construction upon the Glen Canyon dam was substantially completed. This dam was constructed in excess of 500 feet above the bed of the Colorado River. The Government plans provided that two spillways be constructed within the structure of the dam itself or two concrete line diversion tunnels, one on the left side and the other on the right side of the dam. The tunnels ran from the top of the dam in a down-stream direction and discharged into the river on the down-stream side. Each of the tunnels in question had to be cemented and grouted according to the government specifications.

The tunnel on the left side had been fully completed at the time of the accident in question. The accident and controversy occurred in the performance of the grouting of the tunnel on the right-hand side of the dam. The work on this tunnel had progressed to a point approximately 532 feet above the river at which point the contractor had fabricated for high scale work a platform which is described in the evidence as a "jumbo". This jumbo was the identical equipment which was used to perform similar work on the tunnel on the east spillway of the dam, with the exceptions of the safety railings, safety nets, and toe boards which had been removed and not replaced at the time of the accident.

The jumbo itself was mounted on wheels so that it could travel over the surface of the spillway from point to point as the progress of the work required. The jumbo was propelled in such manner by means of a 6-ton cable drum hoist which was situated on the top side of the dam approximately 30 feet from the mouth of the tunnel. A cable lead-

ing from the drum of the hoist ran down to a single shieve pully which was attached to a bridle cable attached to the jumbo and was then returned to an anchor pin, and was then returned back to it at the top side of the cable and strung through one or more shieves or pulleys which in turn were attached to a dead man located behind the hoist and thence back to an anchor pin inserted into a vertical center wall in the mouth of the tunnel.

This anchor hole was drilled into the concrete with a three (3) inch bit a distance of approximately 24 inches deep. (T.P. 132). The hole itself had an interdiameter slightly in excess of three (3) inches. An anchor pin, which was thirty (30) inches long and one and three-fourths ($1\frac{3}{4}$) inches in diameter, was placed into this hole by hand and there rested by gravity alone. (Plaintiffs' Exhibit 7). No cement was used to grout the pin into the hole, nor was any fastening of any kind or nature otherwise added to the pin to keep it rigid, immovable and stationary. (T.P. 164). In this manner the full weight of the jumbo, being twenty-two (22) tons more or less, was entirely supported by the anchor pin. In addition to the jumbo a man car attached to a separate hoist was also anchored to the same pin.

While the jumbo was in the process of being raised up a couple of inches the pin merely "walked" out of the hole which was some inch and one-quarter in diameter larger than the circumference of the pin. This was caused by stress upon the pin. The anchor pin then bent and the cable slipped off, dropping the jumbo some thirty (30) feet before the hoist above could dig into dirt and stop its descent. (See testimony of plaintiffs' expert structural engineer Norman Pederson T.P. 183-185). At the time of the accident plaintiffs Roberson and Rodgers, along with several other employees of Merritt-Chapman & Scott, were working upon

this movable work scaffold, however, Roberson and Rodgers were working on the lowest level of the jumbo.

The jumbo had moved upwards only a couple of inches when the accident suddenly occurred, quickly dropping out from under Roberson and Rodgers and casting them off (T.P. 48, 49). Rodgers grabbed the bridle cable, which traumatically severed the major portion of his right hand. Roberson, not near the bridle cable, was caused to be thrown down the side of the spillway 532 feet to the bottom of the tunnel, causing him to sustain a paraplegia injury to the lower portion of his body and other severe neurological deficits.

At the time of the accident, the dam was in the final stage of completion since the jumbo had been working from the bottom of the west spillway and was within a few feet of completing the cementing process. At this stage the jumbo contained no "hand rails", "guard rails", "safety nets" or "toeboards". (T.P. 46, 48, 49, 67, 68, 100, 284, 285, 287, 372, 375, 416, 417). These safety features were prescribed by the rules and regulations necessary in order to secure the safety of any person working on this jumbo. The violation of these required safety rules and regulations was in contradiction of:

1. U.S. Department of Interior, Bureau of Reclamation "Safety Requirements for Construction by Contract" (Plaintiffs' Exhibit 5);
2. General Construction Safety Code of the Industrial Commission of Arizona (Plaintiffs' Exhibit 14);
3. The Manual of Accident Prevention in Construction (Plaintiffs' Exhibit 15 for identification).

Prior to the plaintiffs' accident, the jumbo contained guard rails, hook-on rails, toeboards, handrails and safety nets (T.P. 33, 37, 38, 49, 157). It is significant that this jumbo

fell while in the east spillway, throwing another iron-worker off; however he was saved from going down the east spillway by a safety net then provided. (T.P. 34). Government inspectors were constantly on the jumbo, approximately six (6) hours per day, (T.P. 11, 12, 34, 35, 160, 360, 361, 370, 371, 419). In addition thereto, the government maintained a chief safety officer who had been in charge of safety on the dam and who made the decisions carrying out safety procedures on the dam (T.P. 109-111). See also the job description of chief safety officer Ruben C. Gaulke, Exhibit 8.

Under chief safety officer Gaulke was his full-time assistant, Dick Blake, whose duties entailed only safety, and who inspected and corrected hazardous situations (T.P. 122-123; see also: daily safety activity reports from March 1, to April 30, 1964; plaintiffs' Exhibits 11 and 12). The general foreman on the dam, Mark Weaver, testified that he was in daily contact with Mr. Blake regarding safety and that if Blake wanted anything corrected that wasn't safe it would be immediately corrected or rejected. (T.P. 8, 11, 12, 14, 15, 24 and 29). Further, safety inspector Blake's "pet peeve" was handrails, which ironically were missing from the jumbo (T.R. 14, 29).

Alex Parker, manager of the accident prevention department of the Industrial Commission of Arizona, recognized the control of the Government regarding the safety on the dam and did not interfere with same (T.R. 330, 331). On cross-examination Mr. Parker pointed out that the safety code of the Arizona Industrial Commission on this type of jumbo required railings 42 inches high, toeboards, and screens or solid sides up to 42 inches (T.P. 328, 334). Numerous witnesses testified that the Government controlled methods of work and implemented the safety program on the dam. (T.R. 14, 15, 34, 35, 42, 51, 53, 372-375,

377, 401, 417). The Government, by and through its inspectors, and for seven years hence, maintained, supervised, and controlled the entire safety program throughout the Glen Canyon Dam which by necessity controlled the method and manner that the work was to be performed.

Merritt-Chapman & Scott, the contractor, had no safety program nor safety engineer (T.P. 24). The only mention of any semblance of safety was that of a "materials expediter", one who goes after materials or "an errand boy to go get parts". (T.P. 12, 20). This employee of the contractor was given six jobs in addition to being a permanent materials man (T.P. 12). This materials man had no safety training and had never on his own initiative instituted safety practices. (T.P. 13). Dwight Johnson, the expediter, didn't even acquire additional duties including *safety* until April 15, 1964, the date of the accident, (T.P. 24, 362) as did witness Guy Lewis, who also was requested to assist the government inspectors on April 16, 1964, after plaintiffs' accident (T.P. 51-52). Complete reliance and security was placed upon the Government by all concerned by virtue of their direction of the mode and method of work.

The evidence adduced, clearly demonstrates that the defendant Government intentionally broadened the scope of safety management officer Gaulke's duties and assumed control over work so as to avert accidents (Exhibit 8).

Prior to the falling of the jumbo in question the Government's employees inspected the rigging and installation of said jumbo; compare the deposition admitted into evidence (T.P. 402) of supervisory government construction engineer Eugene B. Anderson. Anderson's duties included the administration of safety and investigation of accidents (Anderson Depo. pg. 5—line 26). The work elevator had been installed in the west spillway in an unusual and un-

safe fashion by suspending the 22-ton elevator by one cable held in the concrete wall by a 30-inch-long pin, 1¾ inch around, not cemented nor bolted into the wall. This type of rigging should not have been used according to Government engineer Anderson, (Depo., pg. 12—line 13). See also the testimony of structural engineer Pederson, who described this anchor as “not safe” (T.P. 200).

The anchor pin protruded some 8 to 12 inches (T.P. 131) out of the hole. The said pin should not have protruded over 2 inches or it would exceed its yield point, making it an unsafe anchor (structural engineer Pederson, T.P. 200). Pederson further testified that the pin bent 14 inches out of the hole after it had “walked out” on repeated occasions (T.P. 183, 184, 185). Safety inspector Gaulke also testified that the general rigging and weight stresses and strains to be placed on contraptions *were his* responsibility, but that he “didn’t recall checking this particular piece of equipment over”, (T.P. 134, 135). Plaintiff Rodgers had only worked on the jumbo one day and was not familiar with any of the aspects of how or why the jumbo was anchored, and thought that Government inspectors were watching over the places he was working, since he was primarily a welder (T.R. 281, 313, 316). According to experts witness Pederson, Government employees Anderson and Mullins, and witness Sexton, it was necessary to cement the pin in place.

Testimony from the general foreman and other employees illustrates the impossibility for plaintiffs to wear safety belts since there was no place to attach them. Further that work could not be accomplished, and even if a safety belt was practical one might readily be dragged under the wheels of the jumbo (T.P. 56, 432). Even Government inspectors did not wear safety belts while inspecting on the jumbo (T.P. 17, 56, 304, 361, 432).

Some week or ten days before the accident, Government construction engineer Anderson inspected the pin "looking for unsafe things" (Anderson, Depo., pg. 5) and further Anderson inspected the rigging many times himself (Depo., pg. 19, line 22), and "this type of rigging was a surprise to Anderson because one pin shouldn't have been used" (Depo., pg. 24, line 13), "and if the pin had been cemented or bolted in, it would not have given" (Anderson Depo., pg. 30, line 3). Supervisory engineer Anderson stated "that he would not go down on the jumbo himself because it was "too dangerous". (Depo., pg. 25, line 22).

After Roberson's and Rodger's accident, handrails, toe-boards, and other safety devices were immediately installed upon the jumbo, at the direction of the government inspectors (T.P. 66, 67, 362, 365). The Bureau of Reclamation Daily Safety Activity Report (Exhibit 12) for April 17, 1964 denotes an inspection for safety nets on the jumbo as required by the United States Department of the Interior, Bureau of Reclamation, Safety Requirements for Construction by Contract (page 27 of Plaintiffs' Exhibit 5).

Questions Presented:

The questions presented in this appeal are in substance as follows:

1. After the United States Government assumed complete execution and control over the safety program, are they liable for their active negligence, which increased the danger to the plaintiffs?
2. Can liability arise from the negligent performance of a voluntary undertaking to inspect and insure safety?
3. Did the defendant Government have a duty to properly inspect and rectify unsafe conditions after its safety inspectors and engineers had previously enforced safety

and had previously required safe rigging of scaffolds, safety railings and nets, which the absence of increased the danger to plaintiffs?

4. Since the Government had undertaken the execution of the safety program and had enforced same for some seven years prior to the accident, did they have a duty the last few months that the dam was under construction to continue to exercise skill and competence and not to increase dangers to plaintiffs?

5. Did the Government owe a duty to plaintiffs to furnish them a safe place to work when hazardous and inherently dangerous conditions existed which the Government had previously protected them against?

6. Could the plaintiffs have been liable for contributory negligence when:

- a. This defense is not available under the hazardous occupation statutes of Arizona?
- b. It was not practical nor safe to wear safety belts on the work platform?
- c. The proximate cause of the negligence was failure to enforce safety rules and faulty inspection, not lack of safety belts?

With regard to each of these questions, the lower court adopted Findings of Fact and Conclusions of Law adverse to these appellants. The question remains whether such findings and conclusions are supported by any substantial evidence or any legal principles.

ARGUMENT**1. Retention of Control Over the Employees of an Independent Contractor Coupled with Retained Control Over Method and Manner of Work and the Complete Execution and Implementation of a Safety Program Over the Dam Subjects the Government to Liability for Failure to Exercise Retained Control with Due Care.**

Strangely enough, the lower court's Findings of Fact favor the position that the Government retained control over the work on the dam. The Government had, and did exercise, the right to shut down the job until corrective measures were taken. (Finding of Fact No. 3). That in fact the Government did exercise this prerogative, and did insist upon strict compliance with the Government's safety program. (Exhibit Nos. 11 and 12—daily safety reports). The Government, by and through its safety officers, either obtained immediate response to their safety orders, or rejected the work. (T.P. 8, 11, 12, 14, 15, 24, 29).

A casual perusal of the testimony and Exhibit No. 8, shows that the Government, by necessity, did execute their own safety program throughout the entire dam to protect the workmen from possible falls and injury. Even the safety officer of the Arizona Industrial Commission recognized this, and evidently so did Merritt-Chapman & Scott, who never had anyone designated, even part time for safety, until plaintiffs' accident, some seven (7) years after the inception of the dam. Retention of control of any part of the work, as in the instant case, necessitates due care in exercising said control.

An examination of the safety management officer's amended job description some twenty (20) months before appellants' accident, readily discloses the Government's intentions regarding control over work on the dam. See plaintiffs' Exhibit No. 8:

Dated 7/25/62
Page, Arizona

POSITION DESCRIPTION * * * *

"New position in lieu of self, Safety Management Officer.

"The dam is now about 500 feet above the river. This great height increases the hazard to workmen from possible falls and injury to workmen below from falling objects. Much work must be done on the upstream and downstream faces of the dam in setting concrete forms and repositioning conduit, pipe and conductor cable. A great amount of transmission line construction is in a very rugged and mountainous area, requiring constant precautions to avoid accidents from falls and exposure to inclement weather. Future installation testing and operation of power generating equipment will greatly increase the hazard of electric shock and exposure to moving machinery. In recognition of these factors, the safety program of necessity has been broadened to such an extent that proper administration requires the function to be placed at an administrative level with the Safety Officer reporting directly to the Project Construction Engineer. The incumbent has two staff assistants responsible for safety program execution over the dam, powerplant and Page area and over the several hundred miles of power transmission lines.

"SUPERVISION AND GUIDANCE RECEIVED:
The incumbent serves under administrative supervision of the Project Construction Engineer, who specifies scope and objectives of the safety program and periodically reviews work accomplishment for effectiveness and compliance with Bureau, Regional, and Project policies. *Extensive experience in coping with the many and varied hazards confronted in heavy construction of the kind and scope employed by the Bureau on major projects is an essential requirement of this position.* The incumbent has available for reference such guides as Part 365 of Reclamation Instructions; Safety Requirements for Construction by Contract; Federal and

State Statutes pertaining to health, safety and welfare of employees engaged in construction activities; and safety publications distributed by the Bureau of Mines. The Regional Safety Officer, Salt Lake City, is available for consultation concerning application of the Regional Safety Program to project activities.

"REPRESENTATIVE DUTIES: The incumbent serves as a Safety Management Specialist with responsibility for the following:

"1. Develops and maintains on a current basis a safety program devised to provide constant surveillance of hazardous construction activities and to ascertain that safety rules, regulations and practices are observed by both Bureau and contractor employees.

"2. Collaborates with management officials of the several contractors in establishing safety programs to comply with Bureau safety requirements for contract construction and State and Federal Codes. Periodically meets with these officials to correct safety deviations by contractors personnel and to assist in revising safety programs to provide for changing conditions resulting from progress of construction.

"3. Calls attention to any of the several contractors to violations or disregard by employees to provisions of contract obligations as specified in the Bureau Handbook, 'Safety Requirements for Construction by Contract'. Insists on compliance to those provisions and the taking of corrective measures to prevent reoccurrence of violations.

"4. Examines engineers' and inspectors' reports of accidents resulting in bodily injury to contractors' employees or damage to equipment to determine whether such accidents were unavoidable or due to disregard of safety rules and regulations. Analyzes cause of accidents not resulting from violations and recommends to supervisor changes in work procedures or adoption of supplemental safety requirements to prevent reoccurrence.

"6. The incumbent examines the approved safety program periodically to determine its effectiveness and adequacy in keeping accidents to a minimum. *Recommends such amendments or additional inclusions made necessary by changing field conditions.* Initiates and recommends changes in policy that may be required to meet current requirements and objectives of the safety program as construction progresses." (Emphasis supplied)

The Arizona Supreme Court has adopted the Restatement of the Law of Torts on the doctrine of control, compare *Matsumoto v. Arizona Sand and Rock Company*, 80 Ariz. 232, 295 P.2d 850, 853:

"We are of the view that the position of plaintiff is sound. It is stated in Restatement of the Law of Torts, section 414, p. 1120, that:

'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.'

In an analogous factual situation the Chief Judge of the Eastern District of Tennessee considered a similar situation and ruled in behalf of the plaintiff which was upheld on appeal. See *Pierce v. United States*, 142 F. Supp. 721, all points affirmed in 235 F.2d 466; compare on page 728-729 of 142 F. Supp.:

"It is true that an employer is not generally liable for the negligence of an independent contractor. However, there is an exception in those cases where, from the nature of the particular work or project, in the natural course of events mischievous consequences can be expected to arise unless means are adopted to pre-

vent it. In such cases the owner-employer is held to be under a non-delegable duty to see that appropriate preventative measures are adopted."

* * * * *

"Although much of the inspection work had been delegated by contract to Patchen and Zimmerman, it also appears that the Corps of Engineers had some inspectors in the field who were to see that the electrical work was progressing satisfactorily. And of course by virtue of its own contracts, the government knew that the work to be done would necessitate linemen being in and about both the lines and substations of VOW. It also knew that, unless proper steps were taken to see it was killed, high-voltage power would be on those lines and substations while the work progressed.

"Despite these facts the government took absolutely no steps either to correct the defects in the substation or, failing that, to see that the power was off while the crew of linemen to which plaintiff belonged performed their work upon it.

"In the first instance the government was guilty of negligence in erecting and maintaining the substation in a condition hazardous to workmen. Under the non-delegable duty placed upon it it was also chargeable with the negligence of its independent contractor in failing to kill the power before sending plaintiff upon the pole.

* * * * *

"Once the decision was made to construct substations and bring in power, all of the discretion required had already been exercised. Therefore, it became the duty of the government and its agents and employees to exercise due care in carrying out the program decided upon. The complete failure to do so is outside the protection afforded the discretionary functions already exercised and results in liability on the part of the

government. Such is the holding of a distinct line of cases by our federal courts. * * *

* * * * *

"Neither can the Court accept the government's contention that plaintiff is barred from recovery because he has failed to show negligence on the part of any employee of the government. The premises were under the control of the government. Under its contracts with the companies doing the rehabilitation work, the contracting officer of the Corps of Engineers had the right to approve the work, settle disputes, authorize changes, etc. The dangerous structure was on government premises and the power was purchased and transmitted by the government to be utilized on the premises."

See the testimony of former grouting supervisor Ben Mullins, now a Government employee:

"Q. Who would tell you to replace it, if the diamond drillers took it down?

A. That would either be up to the Bureau inspector or our own—it would be up to us or the Bureau inspector.

Q. Did you ever have a Bureau inspector instruct you, as the supervisor of this grouting crew, to replace cables or handrails?

A. Yes.

Q. Did you do it?

A. Yes.

Q. Did you ever refuse to do it?

A. No." (T.P. 361-362)

* * * * *

"Q. By Mr. Brewer: Did you ever refuse to do anything with respect to safety that any Bureau man told you to correct?

A. No."

* * * * *

"Q. By Mr. Brewer: What was the answer?

A. Not to my knowledge. Anything that we were told to do to make this safe, or when the inspectors said something, we went along with him and done it.

Q. You hopped to it, didn't you?

A. Yes." (T.P. 366)

See also *Schmid v. United States*, C.C.A 7 (1959) 273 F.2d 172, 173-174, 176-177:

"The scaffolding in question had been erected at this site on the morning of the day prior to the injury which occurred in the late afternoon of September 20, 1955. While the government retained general supervision of the construction project, it reserved no degree of control over the details of the performance of the Construction Company under the contract. A government inspector made periodic visits and had been at the site of the accident about 8:00 o'clock in the morning of the day of the injury."

* * * * *

"The record supports a finding that the United States knew or, in the exercise of reasonable care, could have known that the scaffold on which Schmid was working was in a dangerous condition in that some of the floor boards lacked cleats, and it had less than the customary braces. The scaffold had been erected about one and a half days prior to the accident. A government agent was present at the site the morning of the day of the injury. The government, as owner, had the duty under the Illinois Scaffold Act, to see that the Scaffold complied with the Act. Its agents failed to perform that duty. A private person would be liable under these circumstances. *It is immaterial that the independent contractor might also be liable. The government's liability does not rest on the act or omission of the independent contractor but is based on its own failure to comply with the requirements of the Scaffold Act as owner of the premises.*" [Emphasis supplied]

The degree of work control retention does not have to be absolute. See the reporter's notes, *Restatement of the Law of Torts Second* § 414:

“Comment:

a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. *The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.*”
[Emphasis supplied]

See also *Trent v. Atlantic City Electric Co.*, 334 F.2d 847 (1964) C.C.A. 3.

That the defendant Government retained control over the operative details of doing the safety work cannot be questioned in view of the position description of the Government safety management officer's duties, more specifically, paragraph 3 of the job description entitled “Representative Duties”; which creates a duty of said officer to:

“Call(s) attention to any of the several contractors to violations or disregard by employees to provisions of contract obligations as specified in the Bureau Handbook ‘Safety Requirements for Construction by Contract’. Insists on compliance to those provisions and the taking of corrective measures to prevent reoccurrence of violations.”

The heretofore mentioned job description designates Gaulke to enforce the bureau safety manual. Pertinent parts of the Government's safety manual are set forth hereinafter to illustrate that the Government employees, by their own testimony, previous to plaintiffs' accident, enforced these provisions. When compared with the evidence adduced it is unrefuted that the Government inspectors and engineers, Gaulke, Blake, Anderson and his twelve to fifteen subordinates, controlled work and working conditions, thus subjecting the Government to liability for any negligent performance thereof. It is significant that all of these sections were ignored by the Government at the time of the accident—all of which, increased the hazard to the employees of the contractor. See:

"1-1. This manual establishes the health and safety requirements for construction by contract, and is applicable to all construction operations performed for the Bureau of Reclamation by its contractors and subcontractors."

* * * * *

"2-4. *Safety Personnel.* Each contractor shall designate a competent supervisory employee to effectively carry out his health and safety program. Where the nature or size of the job warrants, the Contracting Officer may, at his option, request the contractor to employ a fulltime, qualified Safety Engineer."

* * * * *

"SAFETY BELTS AND NETS

7-20. Employees working from unguarded heights, on steep slopes, or otherwise subjected to falls hazardous to life and limb, shall be secured by safety belts and lines *or protected by use of safety nets. Safety nets shall be used to protect employees erecting or maintaining bridges, or similar structures, or employed in shafts on steep slopes where it is not practical to 'tie*

off.' Safety nets shall be maintained abreast of the operations in order to provide effective protection for the employees exposed to falls. [Emphasis supplied]

* * * * *

"9-1. Before any machinery or mechanized equipment is put into use on the job, it shall be inspected and tested by a qualified person and determined to be in safe operating condition, and appropriate for the intended use. Continued periodic inspection shall be made at such intervals as are necessary to insure safe operation and proper maintenance."

"9-2. Any machinery or equipment found to be in unsafe operating condition shall not be operated until the unsafe condition is corrected. Necessary precaution shall be taken to assure that it is not operated in the unsafe condition."

* * * * *

"9-25. Any guard or safety device removed or made ineffective shall be replaced or restored to safe operating condition immediately after completion of work which required its removal."

* * * * *

"9-29. *Required Performance Test for Cranes, Derricks, Cableways and Hoists.* Prior to being placed in operation, all power cranes, derricks, cableways and hoists shall satisfactorily complete a performance test in order to demonstrate the equipment's ability to safely handle and maneuver the rated loads."

"c. *Derricks, Cableways and Hoists.* All derricks, cableways and hoists, including overhead cranes, shall be performance tested with a test load weighing 110 percent of the manufacturer's rating. In testing cableways, the test load shall be traveled to the upstream and downstream limits of travel and *thoroughly* performance tested in at least three travel positions, including the upstream and downstream limits."

"d. *Record of Test.* Performance tests shall be conducted in the presence of a Bureau representative, and a report of the test submitted to the Contracting Officer's representative. Refer to Figure 19, Record of Test—Mobile Cranes."

* * * * *

"9-79. Hoists used to transport men shall be equipped with a fully enclosed cage, provided with a gate. Sides shall be 1½ inch mesh screen formed of No. 16 U.S. gage wire, or equivalent, and equipped with toeboards."

* * * * *

"16-13. Lumber used in construction of platforms, ramps, runways, temporary floors, and scaffolds shall be of good quality, sound, straight-grained, and free from shakes, checks, dry rot, and large, loose or dead knots. *Scaffolds shall be regularly inspected and maintained in safe condition.*"

* * * * *

"16-19. *Runways, ramps, platforms, and scaffolds of 6 feet or more in height above the adjoining surface shall be effectively guarded with toeboards and guardrails.*"

"16-20. *Wooden guardrails* shall be rigidly supported at intervals not exceeding 8 feet. The height may be from 36 to 42 inches, and intermediate rails shall be provided."

"16-21. Toeboards not less than 6 inches in height or side screens shall be provided as needed to protect employees from falling objects."

* * * * *

"16-25. *Handrails* shall be installed on all stairs with four or more risers, around all stairwells, and at stair landings. Where adequate protection is not furnished by guardrails, an intermediate rail or screen shall be provided. Toeboards not less than 6 inches in height, or screens, shall be installed around stairwells."

* * * * *

"17-16. Walkways or scaffolding equipped with guard-rails shall be provided at the point of placement in walls, piers, columns, etc., located over 10 feet above ground level."

* * * * *

"17-21. Form scaffolding shall be designed and constructed as provided in Section XVI, unless an alternate design is specifically approved by the Contracting Officer's authorized representative. *All scaffolding shall be maintained in good repair and in safe condition.*"

* * * * *

"18-2. *On bridges over 25 feet in height from the ground level, rope safety nets shall be provided and suspended below points where men are working.* The nets shall be made of at least $\frac{1}{2}$ inch-diameter manila rope with $\frac{3}{4}$ inch-diameter borders and 4- by 4-inch mesh. The borders shall be provided with loops for attachment to each other or to the structure frame. Nets shall be kept free of materials and maintained abreast of the operations."

* * * * *

"18-14. All hoists and rigging shall be in accordance with the requirements of Section IX, Machinery and Mechanized Equipment, and Section XI, Ropes, Cables, and Chains." (Emphasis supplied)

See also illustrative pictures of scaffold designs adopted from the U. S. Corps of Engineers. See pictures pointing out safety railings, toeboards, etc., at pp. 225, 227 of Exhibit No. 5.

Arizona has long since established the rule applicable herein that the trial court chose to disregard, see *Arizona Binghampton Copper Co. v. Dickson*, (1920) 22 Ariz. 163, 195 Pac. 538, 540:

"If the employer retains the right of control, or—as in this case—he agrees to furnish the instrumentalities to the contractor to be used in his work, and the latter

is injured by reason of their being defective, a different rule comes into play. The rule deducible from the decisions is well stated in 14 R. C. L. 81, section 19, as follows:

'Where the employer reserves the right to direct the manner of the performance of the contract in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and the latter's employees the duty of exercising reasonable care in respect to such matters.'

"The reason for such rule is that the law imposes upon every owner of premises the duty of keeping them in a reasonably safe condition so that anybody whether contractor, servant, or invitee, lawfully thereon, may not be unduly exposed to danger." (Emphasis supplied)

On cross examination defense counsel elicited a very cogent statement from appellant Rodgers showing complete reliance upon the government; at T.P. 313:

"Q. By Mr. Westover: Well, now truthfully, Mr. Rodgers, you did not think about whether the Government safety inspectors were inspecting the places that you were working or not, did you; you didn't even give that any thought before the accident?

A. *Yes, I sure did.*" (Emphasis supplied)

The unrefuted testimony of general foreman Mark Weaver clearly illustrates the Government's interference with and exercising of control over the method and manner of how the work was to be executed; compare on pages 24-25 T.P.:

"Q. From your observation of the Bureau men, can you tell me with respect to the inspectors which one of them, or which ones of them, or who had safety as part of their duties in conjunction with other duties?

A. *Well, all the inspectors could reject anything that wasn't safe, and they did.*

Q. All the inspectors?

A. But they would generally get in touch with Mr. Blake, and then he in turn would get in touch with me.

Q. *And I take it that would mean the grouting inspectors, the supervisory construction inspectors, and so forth?*

A. *Right.*

Q. *And this, to your knowledge, you know to be part of your duties in conjunction with their regular duties?*

A. *I know it to be true that they did this."*

* * * * *

"Q. By Mr. Brewer: What did you understand Mr. Blake's job to be with respect to the dam, please?

A. He was the Safety Management Bureau.

Q. And did you come in contact with him?

A. Yes, daily.

Q. Daily?

And you would please tell us in what respects you came in contact with him, what would transpire between the two of you?

A. Well, if Mr. Blake seen anything ~~that~~ he figured was unsafe, he would come to me personally and ask for it to be corrected.

Q. Did you have occasion to correct things that he would ask for?

A. Yes.

Q. *Now, with regard to him coming to you, how often and on what occasions would he come to you?*

A. *I would say that on the average it could possibly be twice a day.*

Q. *Twice a day he would come to you with regard to something he observed unsafe?*

A. *I would say on an average, yes.*

Q. *And as general foreman, would you see that his requests were carried out, please?*

A. *Yes."* (Emphasis supplied)

Control and implementation of the safety over the dam was actively exercised by the safety engineer. See T.P. 14-15:

“Q. Incidentally, did Mr. Blake have any specific items or things that he was more interested in with regard to safety than any other things?

A. Yes, I would say that Mr. Blake was—his pet peeve was a handrail.

Mr. Westover: I’m sorry, your Honor. What was the answer?

The Witness: His pet peeve was a handrail.

Q. By Mr. Brewer: Did you have occasion to install handrails at his request?

A. Yes, constantly.

Q. With regard to the safety program on the dam, can you tell us from your observation and your position as general foreman who controlled and implemented the safety program and instructed you to do various things?

* * * * *

The Witness: The Bureau had the final say on our safety program.”

It is noteworthy that the Government safety management officer not only controlled safety, but actually had the responsibility over the *designs, stresses and strains, general rigging, weight and factors of safety* “on equipment like this”; (T.P. 134)

“Q. Let me ask you if you said this in your deposition, at page 36, line 4:

‘The Witness: It was a practice of mine to go over to Merritt-Chapman’s office and discuss it with their design engineer when they made such a contraption, to see what strains and stresses would be placed on it at different times.’

A. Yes, sir.

Q. 'A young man over there by the name of Smith who designed all such structures, *and I would confer with him over there and see that it had a good factor of safety.*'

'Question: *That was a part of your job to do this, I take it?*

Answer: *Yes.*'

Then, at line 26 of 36, I said:

'But the general rigging and the weight would be your responsibility?'

'Answer: *Yes, sir. I didn't say that I checked every piece of equipment that went down there, but something like this, I would have probably checked it over with Smith.*'

"Did you give those answers to that question?"

A. I would probably have checked it over, but I didn't say that I did, sir. I don't recall checking that particular piece of equipment."

* * * * *

"Q. Mr. Gaulke, when the jumbo was placed down in any other area, was this pin type of anchor setup ever used before?"

A. Not to my knowledge, no.

Q. You check over these designs to see if they are safe working conditions for the personnel, don't you? 'Yes' or 'no'?

A. Yes, at that time, that's not always my responsibility, I get other people to do it. I have their assurance that things are all right, but I can't make all inspections myself. I'm not the—"

In reference to the duties performed by Safety Inspector Blake, Gaulke testified:

"Q. By Mr. Brewer: This was his daily job, to stop unsafe conditions in every place that he went; is that correct?"

A. Part of his work. If you will read his inspection report, you will see that he conducted safety meetings—" (T.P. 123)

In conjunction with the foregoing testimony, numerous other examples of control retention and work direction can be observed throughout the transcript at pages 8, 11, 12, 14, 15, 24, 29, 34, 35, 42, 51, 53, 372-375, 377, 401, 417.

The District Court case of *San Felice v. United States*, (1958 W.D. Pa.) 162 F. Supp. 261, at 263, succinctly sets out the prevailing rule of law in comparable Federal Tort Claims Act cases wherein the government retains control but then negligently fails to conduct and carry out a proper inspection on behalf of employees of an independent contractor:

“In addition even if the court were in error in so concluding, another cogent reason exists upon which the liability of United States must be fastened. It is apparent that where the employer has retained some element of control of the job, he should be responsible for the harmful consequence of its performance as a concomitant of the control retained. (citing cases)

“The evidence supports the conclusion that United States was at all times the possessor of the land by and through its construction engineer, maintained control of all areas of Keystone and directed the work to be done and the manner in which it was to be accomplished. That said direction and control was negligently exercised and was the proximate cause in bringing about plaintiffs’ injuries. *I am further satisfied that the negligent conduct of Matthew in failing to conduct a more assiduous investigation and intensive inquiry from United States engineers in view of the extrahazardous nature of the work to be conducted, was the concurrent contributing factor in the resulting explosion and accident.*” (Emphasis supplied)

Compare also *Jamison v. A. M. Byers Company* (1964) 330 F.2d 657, 660:

“Assuming that the defendant retained control over Allegheny’s shoring operation then the instant case is

well within our holding in *Quinones v. Township of Upper Moreland*, 3 Cir., 293 F.2d 237 (1961). There the defendant's Engineer was authorized to assure compliance, by an independent contractor, with the terms of a contract. It appeared from the evidence that an employee of the Engineer visited the job site "two or three times a week" and that he knew the day before the accident that no shoring had been done on a particular excavation, but did not order shoring. We upheld the jury's finding that the Township was liable to the estate of a worker killed when the excavation caved in."

"In doing so we said at page 241 of 293 F.2d:

'What has been said makes it clear that there was ample basis for the jury's fact-finding that Township (1) had "retained control" in the performance of McCabe's [the in-independent contractor] contract, and (2) was negligent in not having required McCabe to shore the trench * * *. Under the circumstances here [this] constituted negligence on the part of the Township.'

In *Quinones* there was 'retention of control' coupled with a failure to properly exercise that control. Here the jury found that the defendant retained control and did nothing to ascertain the condition of the shoring or to remedy any defects that it might have known of."

In view of the over-all gigantic public works project in constructing this huge dam, the government deemed it necessary to retain control over the work with full-time inspectors directing each phase thereof and in conjunction therewith, maintained a full-time safety program executed and implemented by each government inspector. Government control herein was necessary because of the hazardous aspects of the dam, these necessitated a Government dam engineer (Anderson) to be assisted by some fifteen inspectors concerned with safety and engineering, coupled with the addition of two full time safety inspectors under safety management officer Gaulke (see Exhibit 8). Appellants, at

the risk of a protracted brief, deem it necessary to cite those salient portions of the Government and independent employees' testimony pointing out the autonomy of control which existed on the dam as acknowledged by the Arizona Industrial Commission and Merritt-Chapman & Scott, both of whom were lulled into a sense of security. Examples of reliance on the Government can be illustrated by such as the safety net that caught a falling ironworker in the east spillway, continued enforcement of safety officer Blake's pet peeve "handrails"—that the constant presence of inspectors and safety direction on all phases of the job created a reliance by the workers. It was this continued conduct of the Government inspectors and engineers that not only created reliance by Merritt-Chapman & Scott, but also by their employees, and axiomatically imposed liability on the Government for the negligent performance of a voluntary duty previously assumed.

The uncontradicted evidence adduced is that the Government inspectors worked side by side with the employees of the independent contractor for as much as six hours per day. (See also Exhibit No. 2, which depicts Government safety inspectors side by side with ironworkers on the jumbo.) When one takes into consideration the magnitude of the dam and its complexities and size thereof, it is crystal clear that the Government intended to and did retain control over the work, the engineering, and the safety factors concerning the entire construction of the dam. Exhibit 8 in evidence readily discloses that safety management officer Gaulke was in charge of the safety management of the dam and that he was given two full-time assistants to coordinate this necessary job on such a huge construction site. Gaulke, by his own testimony, not only controls safety but also was responsible for all devices

and contraptions “such as this (jumbo)” for safety factors, weight, stresses, strains, designs and general rigging. Supervisory construction engineer for the Government Eugene B. Anderson, in his deposition at page 3 (admitted in evidence) stated that he had been doing construction engineering work *on dams* for “about 20 years.” His job description (Ex. 9) discloses his title as Supervisory Construction Engineer (Dams)—*Representative Duties*:

* * * * *

“In conformance with the Region 4 Safety Program, is responsible for administering safety on the work under his direction. Instructs and trains employees in safe on-the-job work practices. Investigates and reports on accidents occurring on work under his direction and takes necessary measures to have responsible hazards corrected.”

See Anderson’s Depo. pg. 5, lines 14-through 21.

“A. I had a fellow named Brown, and at that time I was in charge of the—of all operations on the dam. *And I had, oh, possibly 12, 15 inspectors under me.*

Q. *Did part of that inspecting entail safety?*

A. *Yes, all inspectors are interested in safety on the job.*”

* * * * *

Q. *Are you supposed to not only note it but go look for it?*

A. *Oh, yes. We are looking for it all the time, oh, yes.*” (Emphasis supplied)

Anderson inspected the pin many times himself (Depo., pg. 19).

It is fundamental that Merritt-Chapman & Scott would not have just ignored safety control over the dam, which by its size alone caused the Government to have fifteen men under Anderson and two full-time safety inspectors under

the chief safety management officer. The idea that Merritt-Chapman & Scott utilized a *single* expeditor, or errand boy, after the accident, in lieu of these numerous Government inspectors, trained to implement safe procedures and working conditions, is untenable. The testimony of Anderson readily points out that engineers are necessary in the utilization of hazardous activities, compare: (pg. 22, Anderson Depo.)

“Q. Let me ask you this:

How can you expect a guy with a fifth or sixth grade education to know the dynamics of engineering?

A. They won’t—

Mr. Gormley: That is argumentative.

The Witness: They won’t hire engineers with fifth and sixth grade education.”

The substantive law of the state of Arizona controls herein. *Rayonier Inc. v. United States*, 352 US 315, 1 L.Ed 2d 354, 77 S Ct 374. That the Arizona Courts have adopted appellants’ position hereinabove stated is without dispute in view of the very recent case law rendered by the Courts. Because of the applicability of these cases, plaintiffs feel the necessity to quote extensively the pertinent parts therein. In *Fluor Corporation v. Sykes* (1966) Ariz. App., 413 P2d 270, the Court stated:

“The question remains, and is assigned as error on appeal, as to whether any negligence of Fluor could have been the proximate cause of this accident. The contention is made that the act of Graver employees in using oxygen for ventilation is a superseding cause, thus cutting off any possible liability on the part of Fluor. The argument is made that it might be possible for Fluor to foresee that the failure to provide proper ventilation might result in asphyxiation, nausea or similar injury, but that it was not foreseeable that oxygen might be used for ventilation, thus causing death by burning.

“There are two answers to this contention. The first is that, as the quoted portions of the Restatement (Second), Law of Torts, section 414 indicates, liability of a person retaining control may arise if such person ‘ * * knows or by the exercise of reasonable care should know that the subcontractors’ work is being so done * * *.’ In this case, the evidence is that the use of this oxygen tank for ventilation had been going on for at least six hours prior to Sykes’ injury. In an answer to an interrogatory, which was offered in evidence by the plaintiff but wrongfully excluded by the trial court, the defendant Fluor admitted that the use of oxygen for ventilation is ‘* * * not considered * * * safe * * *’ because it ‘* * * does support and induce combustion.’ There was evidence that Fluor inspectors were on the job on a daily basis. From this, the jury might very well find that Fluor should have known of the unsafe practice being followed. (pp. 274-275).*

* * * * *

“Fluor also complains of the failure to give its requested instruction No. 2, which would have told the jury, among other things, that Fluor ‘ * * was not responsible for the acts or omissions of the Graver Tank Company, or for the acts or omissions of employees of Graver Tank Company.’ While the defendant may, on retrial, be entitled to an instruction informing the jury that it is not responsible generally for the acts or omissions of Graver, this must be qualified, if there be evidence that Fluor retained certain control over the activities of Graver, to permit liability under the theory enunciated in section 414 of the Restatement (Second), Torts, previously quoted herein. The instruction submitted did not contain this exception and therefore we see no error in refusing to give the instruction. (pp. 275-276) (Emphasis Supplied).*

See also *Welker v. Kennecott Copper Company* (1965)

1 Ariz. App. 395, 403 P.2d 330, 340-341;

“There remains only the contention of the appellant that there was sufficient evidence of control on the part of Kennecott to submit a case to the jury under the rule of law stated in § 414 of the Restatement of Torts.

* * * * *

“Our Supreme Court has previously applied the law of this section to third persons. *Matsumoto v. Arizona Sand and Rock Company*, 80 Ariz. 232, 295 P.2d 850, 56 A.L.R.2d 1385 [1956]. There is public policy involved in the elimination of causes of accidents. The division of control, particularly in the area of safety precautions, may have some tendency to cause accidents. The Court of Appeals of New York has noted this tendency in this language:

‘Uncertainty regarding the division of responsibility for safety precautions between subcontractors and general contractors not only produces litigation over accidents that have happened, but is probably a prime cause of their happening in the first place.’ *Wright v. Belt Associates, Inc.*, 14 N.Y.2d 129, 249 N.Y.S.2d 416, p. 420, 198 N.E.2d 590, pp. 592-593. [1964]

“For the foregoing reasons, this court holds that the duties outlined in § 414 of the Restatement of Torts are owed by the contractee to workmen on the job, and will proceed to consider whether Kennecott retained any controls, the failure to prudently exercise which may have been a proximate cause of this accident.

“During the testimony, Kennecott officials referred to this as a ‘turnkey’ job and likened it to the situation where someone employed an independent contractor to build a house for him. To the court, these analogies are without foundation in the evidence. *Under this contract, no important employee could be employed without Kennecott’s approval, the salaries to be paid*

to all key employees were subject to Kennecott's approval, Kennecott could discharge any employee on the job, and no drawing detailing how the work was to be performed could be released to the field without prior approval by Kennecott. If Kennecott were interested only in results, many of these controls are unnecessary.

"The argument is made that these controls were there to control cost. This is undoubtedly true, but the fallacy of the argument is that costs and safety are inextricably related under this contract. For instance, a sloping of the banks in question would have been a cost borne by Kennecott, which additional cost might have prevented this accident. Kennecott, under this contract, was in control of whether these banks would be sloped, both through its control of the detailed drawings of the work and its control over the safety engineer, whose selection was specifically made subject to Kennecott approval and could be discharged at any time by Kennecott. The basic instability of the subject soil was well known to Kennecott and it was well qualified to draw conclusions as to whether excavations should have been sloped and/or shored. This court holds that under the facts of this case, the jury might have found that Kennecott was negligent in exercising its control over the details of the excavation work and/or over the safety program, and that such negligence was one of the causes of this accident. (Emphasis Supplied)

2. The Trial Court Erred in Refusing to Consider Liability on the Part of the Government for the Negligent Performance of a Voluntary Duty Which Increased the Hazards to the Employees of Merritt-Chapman & Scott.

Plaintiffs' action is based upon careless and negligent acts of the government in view of their control of the work, engineering, and safety program implemented in conjunction therewith. The learned Justice Cardozo succinctly

spelled out the "Good Samaritan" doctrine in *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276, 23 A.L.R. 1425, when he said:

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

See also: 38 Am. Jur., Neg. sec. 17; 5 Harvard Law Review 222. This doctrine has also been recognized in Arizona, see *Taylor v. Roosevelt Irr. Dist.*, 72 Ariz. 160, 232 P.2d 107, 110:

"* * * It is the law that if one who is under no duty to another to protect him in person or property voluntarily assumes such a duty, he must perform it in a reasonably careful manner, and while he is not bound to continue that duty permanently he must see that reasonable notice is given if he intends no longer to perform it. *Cummings v. Henninger*, 28 Ariz. 207, 236 P. 701, 41 A.L.R. 207; *Owl Drug Co. v. Crandall*, 52 Ariz. 322, 80 P.2d 952, 120 A.L.R. 1521."

Arizona adheres to the views of the Restatement of Torts (*MacNeil v. Perkins*, 84 Ariz. 74, 324 P.2d 211; *Serrano v. Kenneth A. Ethridge Contracting Co.*, 2 Ariz. App. 473, 409 P.2d 757);

"* * * (1) One who gratuitously renders services to another, * * * is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise such competence and skill as he possesses" § 323(1) *Restatement of Torts 2d*.

The most exhaustive case delving fully into every aspect of negligence resulting from a voluntary undertaking is *Nelson v. Union Wire Rope Corporation*, (Ill. 1964), 199 N.E.2d 769, starting at 774:

"* * * As is shown by defendant's own citation of authority, *vic.*, *Viduvich v. Greater New York Mutual Insurance Co.*, 80 N.J. Super. 15, 192 A. 2d 596, plaintiffs, to support their actions, had only to show (1) that defendant undertook to make safety inspections and to render safety engineering services under circumstances which created a duty on defendant, owed to plaintiffs, to perform its undertaking with due care, and (2) that the gratuitous undertakings were negligently performed, such negligence resulting proximately in plaintiffs deaths and injuries [citing cases]

* * * *It is this: that in all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto imposes, as a public duty, the obligation to exercise such care and skill.*" * * *

"While recently analyzing the *Van Winkle* case in *Viducich v. Greater New York Mutual Insurance Co.*, 80 N.J. Super. 15, 192 A.2d 596, a New Jersey appeals court again manifested the view that the repeated inspections and the furnishing of certificates for the guidance of *Ivanhoe's* engineer were circumstances which created a duty upon the insurer to inspect with due care." (Emphasis supplied)

* * * * *

"Defendant's duty here did not arise by virtue of its control, or right to control, the equipment, and neither did it arise as the result of any relationship with *Auchter* or its employees. *The duty arose, rather, by operation of law from defendant's own independent and gratuitous course of conduct. Moreover, plaintiffs' charges of negligence are not based upon a defect in the equipment or upon conduct of Auchter's employees, but upon defendant's negligent performance of its gratuitous undertaking.* The *Smith*, *Pabst* and *Van Winkle* cases, as well as *Triolo v. Frisella*, 3 Ill.App.2d 200, 121 N.E.2d 49, are a complete rejection of any concept

that control of the premises where negligence occurs is essential to the liability of a gratuitous actor." (Emphasis supplied)

* * * * *

"* * * *This theory however, either overlooks or misapprehends that defendant was charged with misfeasance, to-wit, that it gratuitously undertook to make safety inspections of the equipment, and practices of its insured, and that it had 'carelessly and negligently performed the said inspections on a certain elevator, or, hoist so that as a direct and proximate result thereof certain plaintiffs were injured and decedents of certain plaintiffs killed'* Defendant was not charged with liability for omitting to preform an undertaking which plaintiffs or Auchter expected or relied upon it to undertake, (see: *United States v. DeVane* (5th Cir.), 306 F.2d 182, 183; *Restatement of Torts*, § 325) *but was charged with having undertaken to perform safety inspections, a lawful act, and with having done so carelessly and negligently. (See: Smith v. American Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564; Restatement of Torts, § 323(1).) By undertaking to act defendant became subject to a duty with respect to the manner of performance. [Citing cases]*" [Emphasis supplied]

See also: *Bollin v. Elevator Const. & Repair Co.*, 361 Pa. 7, 63 A.2d 19.

Under the facts of this record, appellee, United States, is liable for its negligence. See *Indian Towing Co. v. United States*, (1955) 350 U.S. 61, 68, 100 L.Ed. 48, 56, 76 S.Ct. 122:

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care, to make certain that the light was kept in good working order; and, if the light did become

extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

See also: *Rayonier v. United States*, 352 U.S. 315, 1 L.Ed. 354, 77 S.Ct. 374; *United States v. Gavagan*, 280 F.2d 319; *United States v. DeVane* (1962), 306 F.2d 182; *United States v. Lawter*, (5 C.C.A. 1955), 219 F.2d 559, at page 562; and 38 Am.Jur. "Negligence", § 17; Restatement, Torts, 2d §§ 323, 324.

Therefore, by operation of law, it is elementary that the defendant Government, by virtue of the facts herein, automatically become liable for its negligence by:

1. Failing to take appropriate steps to rectify the hazardous rigging of the jumbo as was chief safety management officer Gaulke's job pursuant to his own testimony. See also United States Department of Reclamation Safety Requirements:

"9-1. Before any machinery or mechanized equipment is put into use on the job, it shall be inspected and tested by a qualified person and determined to be in safe operating condition, and appropriate for the intended use. Continued periodic inspection shall be made at such intervals as are necessary to insure safe operation and proper maintenance.

"9-2. Any machinery or equipment found to be in unsafe operating condition shall not be operated until the unsafe condition is corrected. Necessary precaution shall be taken to assure that it is not operated in the unsafe condition."

In all candor, Government supervision construction engineer Anderson deplored the method of rigging and voiced

his expert opinion as to its hazardous features, which he claimed he was not aware of said conditions in spite of his repeated inspections pursuant to the duties outlined in his job description (Ex. 9 in evidence).

2. The Government's unexcused failure to enforce on *this* occasion, as opposed to its former regular practices of rectifying the per se violations of safety practices and rules and regulations requiring nets, guardrails, handrails and toeboards on the jumbo. (See Exhibit 5—United States Department of Interior Safety Requirements by Contract; Exhibit 14—General Construction Safety Code of the Industrial Commission of Arizona).

3. One Who Employs an Independent Contractor to Do Work Which Should Be Recognized as Containing Conditions of an Unreasonable Risk of Bodily Harm Unless Special Precautions Are Taken, Is Subject to Liability to the Employees of the Independent Contractor for the Failure to Take Such Precautions.

It must be conceded that working on a scaffold 500 feet above the floor of the Colorado River is hazardous. This inherently dangerous situation was readily apparent to the Bureau of Reclamation when they revised their chief safety management officers' duties, see Exhibit 8:

"The dam is now about 500 feet above the river. This great height increases the hazard to workmen from possible falls and injury to workmen below from falling objects. * * * In recognition of these factors, the safety program of necessity has been broadened to such an extent that proper administration requires the function to be placed at an administrative level with the Safety Officer reporting directly to the Project Construction Engineer. * * *"

Therefore, in view of the foregoing and the evidence presented, it was incumbent upon the defendant Government to

take steps to rectify the perilous situation then existing; see *United States v. White* (C.C.A. 9th Cir.) 211 F.2d 79. See also: *United Airlines Inc. v. Wiener* (C.C.A. 9th Cir. 1964) 335 F.2d 379.

The court ruled in *Hopson v. United States* (1956, D.C. Ark.) 136 F. Supp. 804 that the claimant, who had been employed by an independent contractor, was killed while working in the depot, assisting the operator of a joinder machine to remove the inhibitor strips from a substance known as "ballistite." In concluding that the "discretionary function" exception was inapplicable, the court said that if the navy inspectors employed by the Government in the depot were guilty of negligence causing the employee's death, the claim would not be barred.

It has universally been held that owners of premises owe the duty of care to employees of independent contractors in the performance of a non-delegable duty when the owner is put on notice of a dangerous condition of his premises. Compare *Schwartz v. Merola Bros. Construction Corp.*, 290 N.Y. 145, 48 N.E. 2d 299, 302 and cases cited therein. Thus, when the jumbo slipped just seven days prior to appellants' severe accident, the Government therefore was totally aware of this hazardous condition. They did inspect the jumbo, however, they did not make any changes in the rigging and safety features until after it fell the second time on April 15, 1964 with appellants aboard (T.R. 44, 129). Compare the California Supreme Court case of *Kuntz v. Del E. Webb Construction Company*, 18 Cal. Rptr. 527, 368 P.2d 127, wherein it was held that the general contractor's knowledge that ironworkers are normally exposed to dangers and owed a duty to warn ironworkers working at story levels or to take corrective steps to keep the premises reasonably safe for ironworkers to utilize, and further held that it was

immaterial that the danger could have been due in part to the negligence of another contractor working on the premises; see also the Restatement of Torts, Section 449.

The lower court's consideration of the "form" contract between the Government and the independent contractor should have had no bearing in this case since plaintiffs were strangers to that contract and the Government cannot, after committing a negligent act, hide behind the skirts of such a nebulous argument. See *Bollin v. Elevator Const. & Repair Co.*, 361 Pa. 7, 63 A.2d 19, 21:

"* * * In construing the policy the court said: that it was plain that the defendant company was in nowise obligated by its contract to make any inspections whatever; it acquired the right to do so when it chose to do so, and if it had altogether refrained from making an inspection, it would seem clear that it would have incurred no responsibility either to the assured or to the plaintiff. But the defendant having, in the exercise of its volition, made repeated inspections of the boiler and furnished the required certificates, no one could doubt that, by this course of action, a duty was imposed on it, by operation of the contract itself, to act with ordinary care and skill, both with respect to its inspection and its certificate and that there could be no room to doubt that, for the proximate damages occasioned by the absence of such care and skill, the defendant would be answerable to the assured under the contract. The court further said, in regard to the plaintiff who was a stranger to the contract, that there was a broader ground on which the case could be based. It was that, in all cases in which any person undertakes the performance of any act which, if not done with care and skill, will be highly dangerous to the safety of persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill."

The reasoning behind the foregoing is set forth in *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wash. 2d 423, 100 P.2d 1024, 1031, wherein the plaintiff fell in an elevator shaft and brought suit against the owners of the building; the court held as follows:

“* * * But for neither the nonperformance nor the malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done.

“In *Anderson v. London Guarantee & Accident Co.*, 295 Pa. 368, 145 A. 431, 433, it is said by the court that one controlling the operation of a boiler is bound to make reasonable inspection to guard against explosions which may cause injuries to his own employees or to third parties, and that this responsibility may be enforced against an insuring company, citing the *Van Winkle* case, and continues: ‘*But the right of such an indemnitor to inspect does not impose upon it a duty to do so, though, if it sees fit to exercise the privilege, it becomes responsible for the negligence of those appointed to supervise* (Hartford Steam Boiler Ins. Co. v. Pabst Brewing Co. [7 Cir.], 201 F. 617, Ann. Cas. 1915A, 637), if it fails to put in charge competent individuals (*Anderson v. Hays Mfg. Co.*, 207 Pa. 106, 56 A. 345, 63 L.R.A. 540).’” [Emphasis supplied]

It is evident that in the assumption of the safety program and control the work on its *own* dam, the Government lulled the safety department of the Arizona Industrial Commission, the contractors, the subcontractors and the employees thereof, to wit: Plaintiffs Roberson and Rodgers, into a sense of false security when in fact a hazardous and dangerous situation existed. See: *Sheridan v. Aetna Casualty & Surety Co.*, *supra*, at page 1032 of 100 P.2d:

“* * * But, assuming reports to have been made to the city by that company of the elevator’s condition, the fact does not exculpate the appellant. *Its reports might well be found by the jury to have lulled the building department of the city into a sense of security, in respect to the elevator, and that the reports were causes contributing proximately to respondent’s injury.*” [Emphasis supplied]

4. The Lower Court Erred in Refusing to Admit Into Evidence the Manual of Accident Prevention in Construction, When Said Manual Is the Recommended Guide in Establishing Safety Practices for Construction Work.

Under the circumstances of this case, the manual of accident prevention in construction should have been admitted as some evidence of the appropriate standard of care to be utilized on the Glen Canyon Dam in Page, Arizona. The rejection of plaintiff’s Exhibit 15, in evidence, contradicts the United States Department of Interior, Bureau of Reclamation—Safety Requirements for Construction by Contracts, (Exhibit 5 in evidence) which states on page 1 thereof:

“1-4. It is recommended that the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, be used as a guide in establishing safe practices for construction work.”

See also: *Fluor Corp. v. Black* (9th Cir. 1964), 338 F.2d 830.

It is note-worthy that § 14-8 therein prominently displays a U. S. Army Corps of Engineers picture of how safety nets should be provided. Other important features are as follows:

1. § 14-5—a lengthy discription on where safety nets are required and how they should be installed.

2. § 15-2—displays a picture of scaffolds and sets forth a criteria for inspection thereof.

3. § 15-8.3—sets forth various types of scaffold machines for lowering and raising scaffolds, stating “the lock and winch mechanism should be maintained in first-rate operating condition at all times and should be inspected frequently”.

4. § 15-8.4—Installation of guardrails.

5. § 15-8.5—Installation of toeboards.

A casual perusal of the manual of accident prevention in construction readily discloses why the government recommends the use of this manual since it contains numerous pictorial illustrations which would have readily acted as a guide to any one of the 18 inspectors had they merely chosen to leaf through its contents.

Ironically enough, safety management officer Gaulke possessed this text, (T.P. 405-406):

“Mr. Brewer: Might we have the bailiff show the witness No. 15 for identification?

(Handed to witness)

Q. By Mr. Brewer: Have you ever seen this type of book before, please, sir?

A. Yes.

Q. You have one in your possession?

A. Yes sir.

Q. You utilize it in your safety work?

A. I use it for reference.”

5. **The Court Erred in Amending the Proposed Order for the Judgment, and Amending Its Judgment Without Finding as a Fact, That if It Were Necessary for the Court to Determine the Question of Contributory Negligence of the Plaintiffs, and Reach a Conclusion in This Respect, That It Would Conclude That the Plaintiffs Were Guilty of Contributory Negligence in Working on the Jumbo, Without the Use of Safety Belts for the Reasons That There Was Absolutely No Evidence Presented in Plaintiffs' Presentation of the Evidence That the Failure of the Plaintiffs to Wear Safety Belts Was Negligence, but Rather That It Was Customary, Proper, Necessary, and Safer Not to Wear Same While Working on the Jumbo, Nor Was There Anything to Even Attach Safety Belts to Since the Handrails and Hook-on Rails Had Been Removed and Never Replaced and That Safety Nets Had always Been Used to Afford Protection and Mobility While on the Jumbo. Further, That This Defense Is Not Available Under the Hazardous Occupations Statutes of Arizona, A.R.S. §§ 23-805; Further, That the Proximate Cause of the Injuries Sustained by the Plaintiffs as Conclusively Shown by the Evidence to Have Been the Faulty Inspection and Lack of Enforcement of Safety Requirements by the Defendant United States Government, and Not the Failure of the Plaintiffs to Wear Safety Belts While Working on the Jumbo.**

It is unrefuted by every witness that testified concerning safety belts that they could not be used because:

1. There were no hook-on rails, hand rails or guard rails to attach a safety belt to at the time of the accident, since they had been removed and never replaced.
2. That it was impractical and impossible to work on the jumbo tied to a short piece of rope.
3. That safety belts had never been utilized before and safety nets were always used in the east spill-way and in the west spill-way after the accident.
4. That Government inspectors who were on the jumbo all day long (T.P. 160) never utilized safety belts. (Compare T.P., pgs. 17, 46, 47, 48, 56, 68, 100, 284, 287, 304, 361, 372, 375, 416, 417, 430, 431 and 432).

See also the Bureau of Reclamation Safety Requirements for Construction by Contract § 7-20:

“* * * Safety nets shall be used to protect employees erecting or maintaining bridges, or similar structures, or employed in shafts on steep slopes where it is not practical to ‘tie off.’ Safety nets shall be maintained abreast of the operations in order to provide effective protection for the employees exposed to falls.”

It is crystal clear that the Government was negligent in not maintaining the safety devices used in the east spill-way, such as handrails, hook-on rails, toeboards and screening as depicted in Exhibit 2 in evidence (photograph taken in the east spill-way of jumbo).

There was absolutely no evidence whatsoever that plaintiffs were guilty of any contributory negligence, and therefore, the court should not have speculated in his amended order for judgment as to same. That plaintiff Rodgers testified that it would be impossible to use a safety belt (T.P. 432).

Therefore in light of the foregoing when there is no evidence of contributory negligence there should have been no mention thereof. See *Sax v. Kopelman* (1964), 96 Ariz. 394, 396 P.2d 17.

Assuming, but not conceding, that plaintiffs were guilty of contributory negligence this defense would not be available. Compare A.R.S. 23-805 which negates this defense by comparative negligence.

See § 23-803 A.R.S.

“The following occupations are hazardous within the meaning of this article:

* * * * *

“4. The operation of elevators, elevating machines, derricks or hoisting apparatus used within or on the outside of a bridge, building or other structure for

conveying materials in connection with the erection or demolition of the bridge, building or structure.

"5. All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath used in the erection, construction, repair, painting or alteration of a building, bridge, structure or other work in which a ladder or scaffold is used." [Emphasis supplied]

See also: Article 18, Section 7, Arizona Constitution.

The proximate cause of the plaintiffs' injuries, is the negligence of the Government in failing to exercise proper care in inspecting and checking the rigging on the jumbo for stress and strains, weight factors, design, and safety factors as was Gaulke's job; and in addition thereto, the Government failed to maintain the safety devices on the jumbo that had previously been installed and replaced on numerous occasions prior to appellants' accident all of which increased the hazards to plaintiffs.

CONCLUSION

Upon all of the grounds, and for all the reasons set forth hereinabove, it is respectfully submitted that the Findings of Fact and Conclusions of Law and Judgment of the District Court appealed from should be reversed and remanded with instructions to reinstate plaintiffs' complaint and to direct the parties to proceed to trial thereon in conformance with the applicable rules of law.

Respectfully submitted

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES M. BREWER



Appendix

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Nos. 20832, 20833 and 20834

In the

United States Court of Appeals

For the Ninth Circuit

JACK ROBERSON and WILLIAM RODGERS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 20832

UNITED STATES OF AMERICA,
Appellant,

vs.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellee.

No. 20833

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 20834

Opening Brief of
Merritt-Chapman & Scott Corporation

FILED

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Appellee.

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Opening Brief of
Merritt-Chapman & Scott Corporation

(For convenience, the Appellants Roberson and Rodgers will be referred to as Plaintiffs and the United States of America will be referred to as the Government. The transcript of record will be referred to as "T.R.", and the transcript of proceedings will be referred to as "T.P.")

JURISDICTION

This action originated in the United States District Court for the District of Arizona. Jurisdiction was established under 28 U.S.C.A. §§ 1346(b), 2674 and 2671. At the close of the Plaintiffs' case, the District Court ordered judgment for the Defendant United States of America (T.R. 74), and by amended judgment of December 6, 1965, dismissed the complaint of the Plaintiffs, also dismissing the third party complaint of the United States of America filed against Merritt-Chapman & Scott Corporation. (T.R. 57)

The Plaintiffs have appealed from the judgment in favor of the United States of America, and have further appealed from the amended findings of fact and conclusions of law dated November 29, 1965. (T.R. 52) The United States of America has appealed the dismissal of the third party complaint, and Merritt-Chapman & Scott Corporation now appeals the amended judgment entered on December 6, 1965, insofar as such judgment fails to adjudicate as a matter of law that Merritt-Chapman & Scott Corporation can in no way be liable to the United States of America for any portion of the judgment, if any, rendered or to be rendered in favor of the Plaintiffs; and that order of the District Court entered August 16, 1965, (T.R. 74) granting the motion of the United States of America to strike those matters designated as "additional defenses" by Merritt-Chapman & Scott Corporation in its answer to the third party complaint of the United States of America. (T.R. 84) The appeals have been consolidated for briefing purposes, and the Appellee and Cross-Appellant Merritt-Chapman & Scott Corporation now submits its single brief opposing the appeal of the United States of America, numbered 28033; in support of its appeal against the United States of America, numbered 20834; and pursuant to Rule

74 of the Federal Rules of Civil Procedure in opposition to the appeal of Plaintiffs-Appellants, numbered 20832.

SUMMARY OF ARGUMENT

The court erred in granting the motion to strike Third Party Defendant Merritt-Chapman & Scott Corporation's "additional defenses", and erred in failing to enter judgment on behalf of Third Party Defendant for the following reasons:

A. The appeal of the Plaintiffs-Appellants and therefore the appeal of the Government must fail, since the Government owed no duty to the Plaintiffs-Appellants upon which liability for negligence can be predicated.

B. Merritt-Chapman & Scott Corporation cannot be liable to the Plaintiffs because of its immunity from suit by the Plaintiffs-Appellants. The Government, having paid for the Workmen's Compensation Insurance giving rise to Merritt-Chapman & Scott Corporation's immunity, is entitled to the same immunity.

C. The Government cannot recover from Merritt-Chapman & Scott Corporation on a theory of common law indemnity.

D. Under the Workmen's Compensation Act of the State of Arizona, Merritt-Chapman & Scott Corporation is immune from suit by its employees, and such immunity prohibits any action by the Government against Merritt-Chapman & Scott Corporation based upon injuries to the employees of Merritt-Chapman & Scott Corporation.

E. No specific contract of indemnity against the negligence of the Government existed between the Government and Merritt-Chapman & Scott Corporation, and there is no indemnity against the negligence of an indemnitee except when the same is specifically expressed by contract.

F. The contract between the Government and Merritt-Chapman & Scott Corporation cannot be construed so as to give rise to an implied warranty indemnifying the Government against its own negligence.

ARGUMENTS

A. THE APPEAL OF THE PLAINTIFFS-APPELLANTS AND, THEREFORE, THE APPEAL OF THE GOVERNMENT MUST FAIL, SINCE THE GOVERNMENT OWED NO DUTY TO THE PLAINTIFFS-APPELLANTS UPON WHICH LIABILITY FOR NEGLIGENCE CAN BE PREDICATED.

It is necessary before considering the question of indemnity between Merritt-Chapman & Scott Corporation and the Government to consider the asserted liability on the part of the United States. In this case recovery was sought against the United States solely because of the negligence of the Government and not by virtue of the negligence of Merritt-Chapman & Scott Corporation having been imputed to the Government.

By looking to the final argument of Plaintiffs' counsel, we can determine exactly the theory of the Plaintiffs against the Government. The argument of Plaintiffs' counsel commences at page 436 of the transcript. There Plaintiffs' counsel indicated that Plaintiffs' theory was based upon the proposition that the Government had undertaken a duty to supervise safety and it failed in the performance of the duty of supervising safety. (Page 436, lines 20 and 23; page 437, lines 10-13; page 439, lines 8-12; page 441, lines 4-5 and lines 13-17; page 444, lines 5-16). The court desired to insure that it was aware of Plaintiffs' contention and gave Plaintiffs' counsel an opportunity to dispel any misapprehension that the court might have. The court said at page 446:

"As I understand Mr. Wilmer's position, and he may correct me if I am wrong, it is that assuming there was no duty on the part of the United States to conduct

any kind of safety inspection program, or anything of that nature, once they undertook to conduct such a safety program, his position is that they failed to conduct it properly and that failure resulted proximately in the injuries to the plaintiffs, whether it be through the pin or the lack of a guardrail."

To further assure there would be no mistake, the following exchange took place between Plaintiffs' counsel and the court at page 447 :

"The Court: Did I misunderstand you in my statement?

Mr. Wilmer: No, that is exactly correct, your Honor."

Similarly, examination of the brief of the Plaintiffs-Appellants reveals that the Plaintiffs seek to hold the Government liable for negligence not because of a non-delegable duty to provide a safe place to work, not because of any vicarious liability imposed on account of the acts of employees of Merritt-Chapman & Scott Corporation, not on account of the Government's mere ownership of the premises, but on account of the affirmative actions of employees of the United States Government.

It therefore is perfectly clear that the grounds for liability asserted by Plaintiffs against the Federal Government is the claimed negligence of the Government employees in failing to properly conduct a safety program, entered upon voluntarily.

In *Kirk v. United States*, 270 F.2d 110 (9th Cir. 1959), it appears that the liability of the Government has been dispositively decided against the Plaintiffs herein and in favor of the Government.

There are few situations in which a court is presented with a case on all fours with the issue at hand. Kirk seems indistinguishable both legally and factually. The amazing

similarity of the factual pattern disclosed by Kirk and that disclosed by the case at hand merits a somewhat lengthy exploration of the facts of Kirk. The Ninth Circuit in setting forth the factual basis of its decision in Kirk delineated a picture which, were it not for the difference in the names of the plaintiff and the name of the dam involved, could well serve as the recitation of the statement of the facts in this case. The factual situation disclosed by Kirk was:

"The appellants are the widow and minor child of William A. Kirk, who lost his life when he fell from a scaffold upon which he was working as a carpenter during the construction of the Lucky Peak Dam on the Boise River in Idaho . . .

The control works at the outlet of the dam were being constructed in accordance with plans and specifications prepared by the Department of the Army, Corps of Engineers, under a contract between the United States and Bruce Construction Company and Russ Mitchell, Inc., independent contractors. *Kirk was employed by the contractors as a carpenter and he was not an employee of the United States.*

. . . On the date of the accident . . . Kirk was still engaged in removing the last she-bolt . . . the structure collapsed at the point where the two panels were joined, plunging Kirk into the river . . .

. . . The contract under which the control works at the outlet of the dam was being constructed is typical of contracts used by the Corps of Engineers in the construction of flood control and related projects . . . The employees of Kirk were required to furnish the materials and perform the work for completion of the dam 'in strict accordance with specifications, schedules, drawings and conditions . . .' Under the contract all material and workmanship is subject to inspection, examination and tests by representatives of the *contracting officer* at any and all times during the manu-

facture and/or construction, and the United States retains the right to reject defective material and workmanship or require its correction.” (Emphasis added). (270 F.2d 111-113)

Article 30 of the contract is an almost verbatim reiteration of the accident prevention provisions contained in the contract involved in the case at hand and are substantially the provisions contained in paragraphs 7 and 8 of the general provisions of the contract herein. See *Kirk v. United States*, 270 F.2d 110 at 113-116, and compare with Contract No. 14-06-0-2403, Exhibit A. to Defendant’s Answer. (T.R. 12)

The plaintiffs’ contention in *Kirk* was basically that asserted against the Government in the case at hand, to-wit, that the United States was under a duty to the plaintiffs to properly inspect and carry out the provisions of the safety regulations which it voluntarily entered upon. See *Kirk*, supra, at 117, 118 and paragraphs 5, 6, and 7 of the first cause of action of the plaintiffs’ complaint herein as reincorporated in the same paragraphs of the second cause of action. (T.R. 1)

As was pointed out by Judge Jertberg, speaking for the Ninth Circuit:

“The fatal weakness of appellants’ position, as we see the problem, is that appellants have utterly failed to establish the existence of the legal *duty* upon which they rely.” (270 F.2d 117) (Emphasis added)

In so holding, Judge Jertberg, in an able synthesis of the cases and legislative history, held:

“While this statute clearly authorizes the execution of the contract on behalf of the United States, we are unable to find therein any intent, expressed or implied, on the part of Congress to establish a duty of care

on behalf of the United States toward employees of an independent contractor, or to authorize the creation of such duty by the Secretary of the Army or the Chief of Engineers through the issuance of regulations, manuals or directives. The statute is silent as to the creation of any duty of care on the part of the United States toward the class of which Kirk was a member . . . If the United States is to be made liable to the employees of independent contractors engaged in the construction of a project under the jurisdiction of the Department of the Army, (and the Bureau of Reclamation of the Department of the Interior in this case is legally indistinguishable therefrom) such liability must be created by legislative act and not be judicial fiat.” (270 F.2d 117) (Parenthetical comment ours) (Emphasis added)

The Ninth Circuit went on to hold that mere voluntary assumption of a program of accident prevention, even though provided for in the contract (and provided for in the identical language which the court must here construe) no liability and no duty on the part of the Government to employees of independent contractors arises as a result thereof. The crucial reasoning of the Ninth Circuit as applied to the lack of duty on the part of the Government was expressed in 270 F.2d 118, as follows:

“The voluntary assumption of such a program [accident prevention and safety program] for the welfare of all parties concerned should not create liability on the part of the defendant to the employees of contractors where the performance, or failure to perform, in no wise increases the hazard to the employees of the contractor beyond that which would otherwise have been present.” (Emphasis added)

The language above emphasized expresses with clarity the test of the duty which the Government owes, if any, to

employees of an independent contractor performing work under a contract for the Government, even though the contract provides for the accident and safety program. Applying this test to the case at hand it is immediately apparent that the Government had no duty to the Plaintiff herein, and thus the Third Party Defendant Merritt-Chapman & Scott Corporation cannot be subjected to derivative liability to the Government, as the safety program contained in the contract in both *Kirk* and this case created no hazard to the Plaintiffs Jack Roberson and William Rodgers, herein, beyond that which would otherwise have been present. Thus the Government owing no liability under the contract to the Plaintiffs, it may not assert any right of indemnity against Merritt-Chapman & Scott Corporation.

But of greater importance is the fact that it is inherent in both the language and legal conclusion expressed in *Kirk*, supra, that if the contract creates no liability on the part of the Government to employees of a contractor, the clause in the contract construed to place no duty upon the Government toward employees of the contractor, can certainly not be said to create any duty or liability from the contractor to the Government.

A provision of a contract such as discussed in *Kirk* and with which the court is here faced does not create a duty to those who are "incidentally benefited" if the contract provisions are properly performed, nor toward those who may be "incidentally injured" if they, the contract provisions, are not properly performed. It cannot be said to place any duty or responsibility, as a matter of law, on the Government, vis-a-vis *Kirk*. Thus, if the insertion of these rules, regulations, manuals and directives into the contract, as pointed out by the Ninth Circuit, are *merely provisions to secure the safety and welfare of the public as an entity*, as a matter of law they do not establish a civil liability either

on the part of the Government or on the part of the other party to the contract, in this instance Merritt-Chapman & Scott Corporation.

In addition to the language contained in the contract discussed in *Kirk*, we have an even clearer expression of this principle in the contract with which the court is faced in this instance. In paragraph 10 of the General Conditions of the contract it is expressly provided:

“nothing in this paragraph shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.”
(T.R. 12)

Is the contracting officer seeking to “enforce” them in this lawsuit? Certainly not. The contracting officer is not seeking to enforce them on behalf of the plaintiffs. Nor is the contracting officer seeking to enforce them in the third party complaint filed herein by the Government. The clear and only purpose of the provisions of the contract safety manuals, etc. is merely for the purpose of reducing the risks to the public generally and to permit the contracting officer general safety supervision over the project for the protection of the public as an entity and not for the protection of the plaintiffs herein. See *Kirk v. U.S.*, *supra*, 270 F.2d 110, at 117.

In the recent case decided by the Tenth Circuit, *U. S. v. Page*, 350 F.2d 28 (10th Cir. 1965), *Cert. denied*, 382 U.S. 979 (1966), the trial court held the Government liable for failure to properly supervise safety practices, for failure to prescribe safety practices and for failure to properly inspect the Government property. The court, speaking through Judge Seth, reversed stating:

"The fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of non-liability for the torts of the contractor because *no duty* is created to employees or third parties." (350 F.2d 30) (Emphasis added)

By identical construction of the instant contract, it must be said that the following provision creates *no* duty to the Government:

"He (the contractor) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (General Provisions paragraph 9) (T.R. 12)

If the Government contends this paragraph creates a duty by the contractor to the Government, it should specify what duty is contended to have been created and what words create such a duty.

Page goes on to say:

"The fact that the work and duties of the independent contractor and of his employees originate in a contract, in plans, or regulations issued by the Government does not create a duty by it to employees where there was not such an affirmative control and direction by Government officials over the employees or interference in the work of the contractor as to create conditions where there was in fact no independent contractor." (350 F.2d 31)

Additional cases holding a lack of duty prohibits any such claim as is asserted here are:

Strangi v. U. S., 211 F.2d 305 (5th Cir. 1954);
Hopson v. U.S., 136 F.Supp. 804 (W.D. Ark. 1956);
U. S. v. Hull, 195 F.2d 64, 67 (1st Cir. 1952);
Nyquist v. U.S., 226 F.Supp. 884 (D. Mont. 1964).

Let us now look to the remainder of the record to determine if any obligation exists on the part of Merritt-Chapman & Scott Corporation to indemnify the Federal Government for the negligent conduct of Government employees.

B. MERRITT-CHAPMAN & SCOTT CORPORATION CANNOT BE LIABLE TO THE PLAINTIFFS BECAUSE OF ITS IMMUNITY FROM SUIT BY THE PLAINTIFFS-APPELLANTS. THE GOVERNMENT, HAVING PAID FOR THE WORKMEN'S COMPENSATION INSURANCE GIVING RISE TO MERRITT-CHAPMAN & SCOTT CORPORATION'S IMMUNITY, IS ENTITLED TO THE SAME IMMUNITY.

Merritt-Chapman & Scott Corporation, having complied with the Workmen's Compensation Act of the law of Arizona, is immune from liability to the Plaintiffs-Appellants. Arizona Revised Statutes Secs. 23-1022(a) and 23-906(a) (1956). Turning to the factual pattern of the instant case, Merritt-Chapman & Scott Corporation obtained Workmen's Compensation Insurance by virtue of its agreement to do so in its contract with the Government. The Government wished Merritt-Chapman & Scott Corporation to provide for injuries to employees, and therefore required Merritt-Chapman & Scott Corporation to obtain Workmen's Compensation Insurance, absorbing the costs of same as a part of the contract price. Therefore, the Government has paid for the cost of providing Workmen's Compensation Insurance for the benefit of the Plaintiffs-Appellants. It is now being asked to respond in damages following recovery by the Plaintiffs-Appellants from the Workmen's Compensation fund provided by their employers and paid for by the Government. The Government having paid to provide a fund out of which the Plaintiffs-Appellants might recover, and the Plaintiffs-Appellants having taken advantage of that fund, should the Government now have to respond in damages for the same injuries? Extension of the immunity

derived from compliance with the Workmen's Compensation laws beyond the employer of the injured party has been considered by a great number of courts, and certain general rules have evolved as a result. As a general rule, a general contractor is immune from suit by an employee of a subcontractor, when the subcontractor is uninsured, on the theory that the general contractor thereby becomes the "statutory employer", making applicable the exclusive remedy provisions of the Workmen's Compensation Acts. 2 *Larson's Workmen's Compensation Law*, Sec. 72.31, (1961), and cases cited therein. That this immunity should extend to the contractor even though the subcontractor obtains insurance can be effectively argued. As stated by Larson:

"In one sense, this is rather harsh on the general contractor. The object of the 'contractor-under' statutes is to give the general contractor an incentive to require subcontractors to carry insurance. But if the general contractor does conscientiously insist on this insurance, his reward, under these cases, is loss of exemption from third party suit. A sounder result would seem to be a holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of 'third party'." (2 *Larson's Workmen's Compensation Law*, Sec. 72.31, p. 176)

The logical policy argued for in the text is to extend the immunity to include the party who insists upon compliance with Workmen's Compensation laws, and thereby assures an injured workman of a speedy and adequate remedy unfettered by the defenses available in a common law action. Even more so should this reasoning apply to the Government in the instant case, since the Government demanded compensation coverage, and necessarily thereby

paid for same in the contract price. A number of jurisdictions, proceeding on the theory that all of those who contribute to the compensation fund should be immune from actions brought by injured employees, have extended the immunity to the entire "compensation family", extending varying degrees of immunity to persons other than the employer. *Ala. Code Ann.* §§ 7586 and 7587 (1940) (restricting liability of third party-contributor to amount of compensation payable); *La. Rev. Stat.* § 23-1021 et seq. (1950), as interpreted in *Maddox v. Aetna Casualty & Surety Company*, 259 F.2d 51 (5th Cir. 1958). Taking particular note of the policy of Workmen's Compensation laws to fairly compensate injured workmen without burdening the beneficiaries of the acts by application of the defenses available in common law negligence actions, it is evident and equitable that a party providing for payments to the compensation fund should receive the benefit of the exclusive remedy provisions.

While the Government in the instant case admittedly is not a "statutory employer" claiming immunity on that basis, it is clear that the Government has paid for Workmen's Compensation coverage, and that the Plaintiffs have received the benefits thereof. Therefore, justice dictates that the Government should not now be subject to a common law negligence action based upon the compensated injuries.

C. THE GOVERNMENT CANNOT RECOVER FROM MERRITT-CHAPMAN & SCOTT CORPORATION ON A THEORY OF COMMON LAW INDEMNITY.

The Government cannot avoid the consequences of its own negligence by characterizing the same as "secondary" or "passive" as opposed to "primary" or "active" negligence on the part of Merritt-Chapman & Scott.

The claim of the Plaintiff herein against the Government is in the nature of a common law negligence action. The

theory of a common law indemnity action is that one who, without personal fault, has been compelled to respond in damages to a Plaintiff, may recover from another whose wrongful conduct was the proximate cause of the Plaintiff's injuries. In *Busy Bee Buffet v. Ferrell*, 82 Ariz. 192, 310 P.2d 817 (1957), the Supreme Court of Arizona affirmed this principle. In that case, the Plaintiff fell through a trap door on premises occupied by the Buffet, the trap door having been left open by Pastis, a co-tenant of the building. The court affirmed a judgment over in favor of the Buffet against Pastis, finding that the Buffet's liability to the Plaintiff was merely the result of its breach of a legal duty to maintain the premises in a reasonably safe condition for the use of its business invitees. The court found that, in breaching its duty to the Plaintiff:

"The Buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to anyone at that time except through the active negligence of another. Pastis, in opening the trap door and leaving it unguarded, was the immediate cause of Ferrell falling through the opening and sustaining the injuries which form the basis of this litigation." (310 P.2d 820-821)

A discussion of common law indemnity in Arizona is contained in a recent article in the *Arizona Law Review*. See Sherk: *Common Law Indemnity Among Joint Tort Feasors*, 7 Ariz. L. Rev. 59 (1965).

The author, after reviewing the Arizona decisions, states at pp. 69-70:

"It seems safe to conclude, therefore, that Arizona follows the majority rule and restricts the right of indemnity . . . and will continue to deny indemnity to a tort feisor who is actually concurrently negligent in

producing a plaintiff's injury. Thus, any negligent act or omission actually committed by the 'passively negligent' indemnitee himself, whether committed before, at the same time or after the 'actively negligent' joint tortfeasor acts, should preclude the former's right to indemnity in an Arizona court."

In *Slattery v. Marra Brothers*, 186 F.2d 134 (2nd Cir. 1951), the court said, after conceding that a difference in the gravity in fault would allow indemnity in a proper case:

"We cannot, however, agree that that result is rationally possible, except upon the assumption that both parties are liable to the same person for the joint wrong." (186 F.2d 139)

Any characterization of the Government's negligence as "static", "passive", "technical" or "secondary", which might induce a court in an ordinary case to apply the "primary-secondary" principle, is entirely inappropriate in the present case, inasmuch as the entire theory of the Plaintiff's case is predicated upon the active negligence of the Government. Furthermore, the "common liability" requisite of such cases is wholly absent from the present controversy. The entire duty presented by Merritt-Chapman & Scott Corporation to the Plaintiff is defined by the terms of the Workmen's Compensation Acts of the State of Arizona, making it impossible for Merritt-Chapman & Scott Corporation to be subject to a common law negligence action by the Plaintiff, thereby negating the common liability upon which an indemnity action must be based.

Merritt-Chapman & Scott Corporation, as required by Section 10 of the General Conditions of the contract and Section 4-14 of the Bureau of Reclamation publication, "Safety Requirements for Construction by Contract", has provided "the contracting officer or his authorized representative with certificates of insurance prior to the start

of operations indicating full compliance with certificates of insurance prior to the start of operations indicating full compliance with the state Workmen's Compensation statutes." (United States Department of the Interior, Bureau of Reclamation: Safety Requirements for Construction by Contract, 3rd ed. (1962) Sec. 4-14) (Incorporated in Contract No. 14-06-0-2403 by Section 10, General Conditions, thereof) (T.R. 12). The Workmen's Compensation Act of the State of Arizona defines the nature of an employer's duty toward its employees relative to claims for personal injuries. Merritt-Chapman & Scott Corporation was subject to this claim, and this claim only, relative to injuries sustained by the Plaintiffs.

In *Slecht v. Great Northern Railway Company*, 189 F. Supp. 699 (N.D. Iowa, W.D. 1961), *affirmed*, 350 F.2d 917 (4th Cir. 1965) the court enunciated the basis upon which a negligent party can seek indemnity from another alleged to be primarily responsible. Even while espousing an indemnity rule which may be broader than that allowed in Arizona, the court then explained why a negligent indemnitee's claim against *an employer, subject to Workmen's Compensation laws*, must fail:

"Though both are at fault with respect to the injured plaintiff, if the negligence of one is passive while that of the other is active, indemnity will lie against him whose negligence is active. However, there can be no common liability to the employee when the liability of the employer is governed by the terms of the Workmen's Compensation Act and the liability of the third party is based on common law negligence. *American District Telegraph Co. v. Kittleson*, *supra*. When the injured party cannot proceed against one of the joint tortfeasors because of some personal defense that party might have, there is no common liability existing between the alleged joint tortfeasors. (Citing cases)

Consequently, when the employee cannot proceed against his employer in an action for damages because his employer is protected from such action by a Workmen's Compensation Act, there is no common liability between the employer and the third party to the employee, and no right to the indemnity that requires a common liability." (189 F. Supp. 702-703) (Emphasis added)

As stated generally in 2 Larson: *Workmen's Compensation Law*, Sec. 76.21 (1961), p. 231:

"The liability that rests upon the employer is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability."

The court in *Johnson v. United States*, 133 F. Supp. 613, (E.D. N.C. 1955) stated:

"... any notion that the third party, who is sued for damages for negligently inflicting a compensable injury upon the employee, can require the employer to pay a part of such damages by way of contribution under G. S. 1-240 or all of them by way of indemnity under the doctrine of primary and secondary liability is absolutely incompatible with the plain provision of G. S. 97-10, relieving the employer from all liability to the employee on account of the injury except that of paying compensation to him in accordance with the provisions of the Workmen's Compensation Act." (133 F. Supp. 614)

The court continued, acknowledging the argument of the employer-third party defendant:

"It is true, as contended, that under the allegations of the complaint if plaintiff prevails it must be upon a

finding of negligence of the defendant, as to which the contract affords no protection, while, if plaintiffs fail to recover, there, of course, would be no basis for action over against the third party defendant." (133 F. Supp. 615)

D. UNDER THE WORKMEN'S COMPENSATION ACT OF THE STATE OF ARIZONA, MERRITT-CHAPMAN & SCOTT CORPORATION IS IMMUNE FROM SUIT BY ITS EMPLOYEES, AND SUCH IMMUNITY PROHIBITS ANY ACTION BY THE GOVERNMENT AGAINST MERRITT-CHAPMAN & SCOTT CORPORATION BASED UPON INJURIES TO THE EMPLOYEES OF MERRITT-CHAPMAN & SCOTT CORPORATION.

An employee's exclusive remedy against his employer is spelled out in the following statutory language:

"The right to recover compensation pursuant to the provisions of this chapter for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided by Sections 23-906 and 23-964 . . ." (Ariz. Rev. Stat. Ann. 23-1022(a) (1956))

Sections 23-906 and 23-964 concern themselves with an employer's failure to comply with the provisions of the act; no issue has been raised in this proceeding concerning the compliance of Merritt-Chapman & Scott Corporation with the terms of the act.

While Section 23-1022(a), quoted above, can be construed so as to limit the employer's liability only as to actions brought by or on behalf of the employee, Section 23-906 concerns itself precisely with the total obligation of the employer, as opposed to dealing with the exclusive remedy of the employee. The section states:

"Employers who comply with the provisions of Section 23-961 as to securing compensation shall not be liable for damages at common law or by statute, *except as provided in this section*, for injury or death of an employee wherever occurring, . . ." (Ariz. Rev. Stat. Sec. 23-906(a) (1956)) (Emphasis added)

The most obvious reason for denying the relief sought by the Government from Merritt-Chapman & Scott Cor-

poration is contained in the decision of the Supreme Court of California, sitting en banc, in *Popejoy v. Hannon*, 37 Cal. 2d 159, 231 P.2d 484 (1951). The Court said:

"Popejoy's recovery against the Hannonns for the negligence of Sugarman, who would be liable to them, is therefore an indirect recovery of damages from the plaintiff's employer, whose sole liability is that imposed by the provisions of the Workmen's Compensation Act. This is contrary to the purpose and public policy of that statute." (231 P.2d 492)

The California courts have subsequently referred to this decision in *Southern California Gas Co. v. A.B.C. Construction Co.*, 204 Cal. App. 2d 747, 22 Cal. Rptr. 540 (Cal. App. 1962), as follows:

"Another rule is present which eliminates any liability of defendant under the fourth cause of action. Plaintiff paid \$90,000 to two of defendant's workmen in settlement of their personal injury claims arising out of the explosion; it is admitted that the two men injured were employees of defendant acting within the scope of their employment.

The right to recover compensation under the Workmen's Compensation Act is the exclusive remedy against the employer (see former section 3601, Labor Code, in effect when the instant action was filed). To permit plaintiff to recover here on the fourth cause of action would be an indirect recovery of damages for the personal injuries sustained by the two employees as against the defendant employer, whose sole liability is that imposed by the Workmen's Compensation Act. This is contrary to the public policy of the statute (see *Popejoy v. Hannon*, 37 Cal. 2d 159, 172-173, 231 P.2d 484).

It has already been pointed out that plaintiff's suit is not, and cannot be, based upon any contract or agreement of defendant for indemnification of plaintiff." (22 Cal. Rptr. 544)

This rule was so well ingrained in California that when a building maintenance company's employee brought suit against a school district, as a result of which the school district filed a third party complaint against the employer, and the opinion in that case suggested there might be some right to indemnity from the employer on the basis of a breach of contract or implied indemnity, the Legislature promptly rewrote the law so as to preclude such indemnity. See *City of Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 23 Cal. Rptr. 43, 47 (Cal. App. 1962).

In *Halstead v. Norfolk & Western Railway Company*, 236 F. Supp. 182 (S. D. W. Va. 1964), *affirmed*, 350 F.2d 917 (4th Cir. 1965) the Court said:

"Black Rock having already paid its contribution to the Workmen's Compensation Fund and the plaintiff having received the benefits thereof, before fostering a further economic burden on Black Rock, for the same industrial accident to its employee, its legal responsibility therefore must be made to clearly appear." (236 F. Supp. 187)

Admitting a contractual relationship between the Government and Merritt-Chapman & Scott Corporation, but recognizing that the contract between the parties contains no language amounting to an express indemnity against the Government's own negligence, the language of *Royal Indemnity Company v. Southern California Petroleum Corporation*, 67 N.M. 137, 353 P.2d 358 (1960) becomes particularly appropriate.

The Court outlined the problem succinctly as follows:

"To be more specific, the question becomes: Is the exclusive remedy provision of the Workmen's Compensation Act so broad as to grant amnesty to an employer for all causes of action relating to employees' injuries, regardless of the question of independent breach of duty, where there is no express contract of indemnity?" (353 P.2d 360)

At page 361 the Court says :

“Southern California urges that B. J. Service, by its contract, impliedly agreed to do its work without negligence and is therefore liable or must indemnify for the damage proximately caused by its negligence. As to such basic contentions, we do not feel there need be any discussion. However, the next step in the argument is the determinative one. This is: That assuming liability for negligence, and, therefore, indemnity, under the contract, that injuries to employees of B. J. Service are a recoverable item of damage. This assertion has support in several jurisdictions, on the theory that when the employer breaches an independent duty toward the third party, he has an obligation to indemnify. (*American District Telegraph Co. v. Kittleson*, 8 Cir., 1950, 179 F.2d 946; *Rich v. United States*, 2 Cir., 1949, 177 F.2d 688; *Westchester Lighting Co. v. Westchester Co. S. E. Corp.*, 1938, 278 N.Y. 175, 15 N.E.2d 567; *San Francisco Unified School Dist. v. California Bldg. Main. Co.*, 1958, 162 Cal. App. 2d 434, 328 P.2d 785; *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed. 133) However, none of the statutes construed contained such explicit, definite language as does the New Mexico act, and this is true particularly as to the Ryan case, *supra*, in which the Supreme Court of the United States construed the provisions of the Longshoremen’s Act.”

The Court said at page 362 :

“(1) The use of the words in the section of the statute, *supra*, ‘any employer . . . shall not be subject to any other liability whatsoever . . . and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies . . . are hereby abolished . . .’ expressly limits the liability of the employer and destroys the common-law right of indemnity.

(2) Whether or not a different rule might be applied in a case where an employer and a third party had specifically contracted for indemnity, we need not here decide. Suffice it to say that in this case, where reliance is placed upon an implied agreement, we do not feel that the position of Southern California can be sustained as against the strong language of Sec. 59-10-5, *supra*. If such an agreement to indemnify were to be implied, the employer would be obligated to pay damages to an injured employee, through a third party, over and above the amount of compensation fixed by the Act, and thus impose the very liability against which the Act declared the employer should be insulated. This does not appear to be the legislative intention, and the court would not by decision alter the plain, clear language of the legislative enactment. We therefore conclude that the trial court correctly dismissed the third-party complaints."

In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *Cert. denied*, 379 U.S. 951 (1964), the Federal Employees' Compensation Act, 5 U.S.C.A. Sec. 757(b), was held to proclude an otherwise existing right of indemnity with respect to Government employees killed in a mid-air plane collision because of the exclusive liability provision of the Compensation Act.

In *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 (1953), the Plaintiff was an employee of a ship repairing firm who brought suit against the ship owner. By third party complaint, the ship owner sought contribution or indemnity from the ship repairing firm. The Supreme Court held:

"Pope & Talbot's (the ship owner seeking indemnity) contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the act. Moreover, reduction of Pope & Talbot's

liability at the expense of Hawn (the employer) would be the substantial equivalent of contribution which we declined to require in the Halcyon case." (98 L. Ed. 152) (parenthetical material ours)

The court would not allow contribution or indemnity from the employer.

To allow indemnity from Merritt-Chapman & Scott Corporation would frustrate the purpose of the Arizona Workmen's Compensation Act by allowing a second recovery against Merritt-Chapman & Scott Corporation following compliance with the Act.

E. NO SPECIFIC CONTRACT OF INDEMNITY AGAINST THE NEGLIGENCE OF THE GOVERNMENT EXISTED BETWEEN THE GOVERNMENT AND MERRITT-CHAPMAN & SCOTT CORPORATION, AND THERE IS NO INDEMNITY AGAINST THE NEGLIGENCE OF AN INDEMNITEE, EXCEPT WHEN THE SAME IS SPECIFICALLY EXPRESSED BY CONTRACT.

There is absolutely no language in the contract between the Government and Merritt-Chapman & Scott Corporation which could give rise to an express indemnity by Merritt-Chapman & Scott Corporation to indemnify the Government for its own negligence. The Government has predicated its claim of indemnity upon the following contract provisions: Paragraph 10, "General Conditions;" Paragraph 10, "General Provisions;" and Paragraph 11, "General Provisions," Contract No. 14-06-0-2403. (T.R. 12)

Paragraph 10 of the General Conditions provides:

"Accident prevention. The contractor shall, at all times, exercise reasonable precautions for the safety of employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building and construction codes. The contractor shall also comply with the provisions of the Bureau of Reclamation publication, "Safety Requirements for Construction by Contract", in effect on date bids are opened, so far as

applicable, as determined by the contracting officer and unless such provisions are incompatible with Federal, State, or Municipal laws or regulations. Monthly reports of all lost time accidents shall be promptly submitted giving such data as may be prescribed by the contracting officer. Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes or regulations herein specified by any except the contracting officer."

Paragraph 10 of the General Provisions provides:

"The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

Paragraph 11 of the General Provisions provides:

"The contractor shall, without additional expense to the government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. . . ."

It is submitted that none of the quoted language can constitute an express indemnity between Merritt-Chapman & Scott Corporation and the Government, inasmuch as, as a general rule, one can obtain indemnity from his own negligence only in reliance upon language so clear and unequivocal as to demonstrate that such indemnification was the expressed intention of the parties. *Goldman v. Ecco-Phoenix Electric Corporation*, 41 Cal. Rptr. 73, 396 P.2d 377 (1964); *Hollingsworth v. Chrysler Corporation*, 208 A.2d 61 (Del. 1965); *Sinclair Oil and Gas Company v. Brown*, 333 F.2d 967 (5th Cir. 1964); *Donnelly v. Rochester Gas and Electric Corporation*, 44 Misc. 2d 855, 255 N.Y.

Supp. 2d 573 (App. Div. 1965); 42 CJS, *Indemnity*, Sec. 12; 27 Am. Jur., *Indemnity*, Sec. 15. As stated in *Goldman v. Ecco-Phoenix Electric Corporation*, supra,

“We hold that one who seeks indemnification from his own negligence must draft the instrument in *specific, precise and unambiguous terms . . .*” (396 P.2d 377) (Emphasis added)

A far less persuasive minority view has been taken by certain courts in interpreting indemnity agreements so as to protect the indemnitee from the consequences of its own negligence. These courts do not require specific language of indemnity, but still require a clear manifestation of an intention by each party that the indemnitee shall be indemnified against his own negligence. Even in such jurisdictions, such agreements are:

“. . . carefully scrutinized and strictly construed; they must clearly show the intention of one party to protect itself from claims arising from its own acts of negligence *and the intention of the other to assume the obligations.*” (*DeTinne v. F. N. Neilsen Company*, 45 Ill. App. 2d 231, 195 N.E. 2d 240 (Ill. App. 1963) (195 NE 2d 242) (Emphasis added)

Where, as in Illinois, express words of indemnification against the indemnitee's negligence are not necessary, still only language such as “(indemnity against) any and all claims for damages to persons, caused directly or indirectly or occasioned by the execution of the work included in this order” (*DeTinne v. Neilsen*, supra, 195 N.E. 2d at 242), or assumption of the “entire responsibility and liability for any and all damage or injury of any kind or nature whatever . . . to all persons . . . caused by, resulting from, arising out of, or occurring in connection with the execution of the work . . .” (*Gust K. Newberg Construction*

Co. v. Fischback, Moore and Morrissey, Inc., 46 Ill. App. 238, 196 N.E. 2d 513, 515 (Ill. App. 1964)) has been held to indemnify the indemnitee against his own negligence. The above-quoted language from the contract between the Government and Merritt-Chapman & Scott Corporation in no way approaches such language. (T.R. 12)

Concerning the Government's attempt to avoid the consequences of its own negligence by the language of contract, the rules stated in the recent case of *Cate v. United States*, 249 F.Supp. 414 (S.D. Ala. 1966) are particularly appropriate. In examining a Government contract to determine the effect of certain language relative to a Government claim of indemnity against a contractor, the court phrased its holding in the following language:

"The clause upon which the government relies must then stand or fall in light of the rules of general law applicable to the construction of contracts of indemnity. It is stated that 'the indemnitor is entitled to have his undertaking as thus determined strictly construed, and that it cannot be extended by construction, or implication beyond the terms of the contract, especially where the contract was prepared by the indemnitee.' 42 C.J.S., *Indemnity*, § 8(b), p. 576 (1944). The contract here was written by the Government and is contained within a portion of the contract dealing with payments thereunder. 'It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract, but is from one not in the indemnity business and as an incident of a contract whose main purpose is something else, the indemnity provision is construed strictly in favor of the indemnitor.' (Citing cases) . . . 'unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own neg-

ligence.' Applying the foregoing principles, it cannot be said that the clause in this case, when taken in its proper context, contains positive indicia of intent to indemnify the government for the consequences of its own negligence." (249 F.Supp. 417, 418)

Absent language requiring an express indemnity, the language of *Halstead v. Norfolk and Western Railway*, supra, p. 21 becomes particularly appropriate:

"... We find no language in the tariff which could be reasonably interpreted to impose upon a consignee an indemnity liability to the carrier for accidental injury to consignee's employee where such employee is covered by Workmen's Compensation and where, as in West Virginia, the act insulates the employer from common law liability therefor." (236 F. Supp. 189)

It should be noted with reference to the quoted language that the Arizona exclusive liability statute, A.R.S. 23-906, similarly exempts employers complying with the statutes from damages at common law arising on account of injuries to their employees.

In discussing the contractual relationship between an employer and a third party seeking indemnity, the Tenth Circuit in *Hill Lines, Inc. v. Pittsburgh Plate Glass Company*, 222 F.2d 854 (10th Cir. 1955) stated:

"The most that can be said of Hill Lines' theory is that by virtue of the contractual relationship between Hill Lines and Pittsburgh with respect to unloading the truck, Pittsburgh became solely liable to its employee for his injuries. The answer is that if Pittsburgh is either solely or jointly liable for those injuries its liability is limited by the Workmen's Compensation Act. The result is the same. In either event, the Workmen's Compensation law operates to insulate Pittsburgh from liability to Hill Lines." (Emphasis added) (222 F.2d 857-858)

It is important in reading Paragraph 10 of the General Conditions concerning "accident prevention" to consider the entire condition, rather than extracting excerpts from same. Initially, it can be forcefully argued that if the language of the paragraph renders Merritt-Chapman & Scott Corporation liable to provide for the safety of its employees, it has embraced this obligation and provided Workmen's Compensation coverage to provide for same, and that this liability is limited by the provisions of the Workmen's Compensation Act (applying the reasoning of the *Hill Lines* case).

Furthermore, the accident prevention provision does not require the contractor to prevent employee accidents, but only requires that reasonable precautions be taken against same. By the very terms of the accident prevention provision contained in General Condition 10:

"Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes or regulations herein specified by any except the contracting officer."
(T.R. 12)

Not only is there no indemnity contained in the quoted language, there is no language in the provisions indicative of any specific duty; the foregoing provisions concerning accident prevention are merely general safety provisions as applied to Merritt-Chapman & Scott Corporation, just as the safety role of the Government was a general one giving rise to no specific duty. A goal of accident prevention, whether considered relative to the liability of the Government or relative to the liability of Merritt-Chapman & Scott Corporation, is not a sufficient basis upon which to predicate liability. (See *Kirk v. United States*, supra, p. 5, and argument thereon, pp. 5-10.)

F. THE CONTRACT BETWEEN THE GOVERNMENT AND MERRITT-CHAPMAN & SCOTT CORPORATION CANNOT BE CONSTRUED SO AS TO GIVE RISE TO AN IMPLIED WARRANTY INDEMNIFYING THE GOVERNMENT AGAINST ITS OWN NEGLIGENCE.

The Government, recognizing there is no express indemnity upon which to found the third party complaint has attempted to construct one from the contract by reference to *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed 133 (1955). In the Government's motion to strike the Third Party Defendant's defenses, the Government said at page 6:

"In the landmark case of *Ryan* . . ., the Supreme Court held that contractual agreements similar to this one although without an indemnity provision as herein contained amount to a 'contractual undertaking' to perform the special work with reasonable safety, and to discharge 'foreseeable damage resulting to (contractee) from the contractor's improper performance of those requirements.'" (T.R. 22)

Before analyzing *Ryan* to determine if it is applicable here, it is to first be noted that this decision was a divided one by the court, carrying with the minimal margin, five to four. The Chief Justice, Warren joined with Justice Black, Douglas and Clark in dissenting, in an opinion written by Justice Black.

Likewise, in a subsequent opinion, *Italia Societa v. Oregon Stevedoring Company*, 376 U.S. 315, 11 L. Ed. 2d 732, 84 S. Ct. 748 (1964), upon a similar subject, violent dissent again appeared. There, the decision was six to three notwithstanding the prior and apparently controlling decision in *Ryan*.

In innumerable cases citing *Ryan*, it has become readily clear that the principles of *Ryan* apply only to maritime situations. The very language of the majority opinion in the *Italia Societa* case, *supra*, makes this clear. There the Court said:

“Both sides press upon us their interpretation of the law in regard to the scope of warranties in non-sales contracts, such as contracts of bailment and service agreements. *But we deal here with a suit for indemnification based upon a maritime contract, governed by Federal law (citing authority), in an area where rather special rules governing the obligations and liability of ship owners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents.* By placing the burden ultimately on the company whose default caused the injury, (citing authority) we think our decision today is in furtherance of these objectives.” (11 L. E. 2d 741) (Emphasis added)

Regardless of the method of reasoning as to how the court arrived at its decision in Ryan, the ultimate conclusion of the majority was that the stevedoring company, the employer and Third Party Defendant, had breached a contractual warranty to the Defendant shipowner, which gave rise to the indemnity. The court said at 100 L. Ed. 140:

“The Act nowhere expressly excludes or limits a shipowner’s right, as a third person, to insure ~~itself~~ against such a liability either by a bond of indemnity, or the contractor’s own agreement to save the shipowner harmless.”

The court went on to amplify:

“In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner’s right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right.”

“The shipowner’s action here is not founded upon a tort *or upon any duty which the stevedoring contractor owes to its employee.* The third party complaint is

grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act." (Emphasis added)

The court then described the agreement it had construed to exist in Ryan as follows:

"This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's *warranty* of workman like service that is *comparable to a manufacturer's warranty* of the soundness of its manufactured product." (100 L. Ed. 142) (Emphasis added)

Let us now consider whether the contract provisions with Merritt-Chapman & Scott Corporation fall within the purview of the warranty discussed in Ryan.

First of all, the General Provisions Section 11 sentence states:

"He (the contractor) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (T.R. 12)

Wherein is there any warranty here? Wherein is there any duty or obligation running to the Government? There is but one; had the contractor damaged property of the Government through "fault or negligence" the contractor would have been "responsible" for the "damages" to the "property". As pointed out explicitly by Ryan, the doctrine therein announced does not apply to the tort of the alleged indemnitor, only to "breach" of the warranty.

The same reasoning applies to the language of section 10 of the General Conditions:

"The contractor shall, at all times, exercise reasonable precautions for the safety of employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State and municipal safety laws and building and construction codes." (T.R. 12)

Can any warranty such as a manufacturer's warranty running in favor of the Government be established here? In *Ryan*, safe storage of cargo, for which the Defendant shipowner was absolutely an insurer, was being protected by the warranty; but in the instant case there is nothing but torts toward persons, third parties to the contract, being described.

It would be much too lengthy to explore the background of the *Ryan* decision. However, we can cite the court to two Supreme Court opinions which preceded *Ryan* and one which followed *Ryan* that make it expressly clear the limited effect which *Ryan* should have, notwithstanding certain of its language which, taken out of context, might seem more broad than it truly is. In order to more fully understand *Ryan* the following cases should be read in the following order: *Halcyon Lines v. Haenn Ship C & R Corp.*, 342 U.S. 282, 96 L. Ed. 318, 72 S. Ct. 277 (1952); *Pope and Talbot, Inc. v. Hawn*, *supra*, p. 23; *Weyerhaeuser S.S. Co. v. U.S.*, 372 U.S. 597, 10 L. Ed. 2d 1, 835 S. Ct. 926 (1963).

In *Halcyon*, the first of the three, the Plaintiff was an employee of a ship repair firm. Indemnity was not sought by the shipowner from the employer, only contribution. (Contribution would have been applicable had Plaintiff been a longshoreman or a seaman.) The Supreme Court held there was no right to contribution except by legislation and they would leave it up to the legislature to change. In the second of the three cases, *Hawn*, the Plaintiff was again an employee of a ship repairing firm and sued the shipowner.

By third party practice the shipowner sought *contribution or indemnity* from the employer. The court held in language previously quoted at page 24 herein:

“Pope & Talbot’s (the shipowner seeking indemnity) contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the Act. Moreover, reduction of Pope & Talbot’s liability at the expense of Haenn (the employer) would be the substantial equivalent of contribution which we declined to require in the *Haleyon* case.” (98 L. Ed. 152)

And the court held there could be neither contribution *nor* indemnity.

The third of these three cases, *Weyerhaeuser*, followed *Ryan*, and dealt with a plaintiff seaman, employed by the United States, who brought suit against *Weyerhaeuser* by virtue of a two-ship collision. *Weyerhaeuser* brought in the United States as a Third Party Defendant, relying on *Ryan*. The Supreme Court, in considering the effect that *Ryan* had upon the situation there presented, stated that the Federal Employees Compensation Act language (being considered in *Weyerhaeuser*) was identical to the language of the Longshoremen’s and Harbors Workers’ Compensation Act considered in *Ryan* (10 L. Ed. 2d 5). The court there described the language of the Act as follows:

“Section 7(b) provides that the compensation remedy shall be exclusive with respect to the Government’s liability ‘to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States. . . .’ The Government points out that the general words ‘anyone otherwise entitled to recover damages’ literally would cover a shipowner entitled to recover divided damages after a mutual fault collision. But the general language upon which the Government relies

follows explicit enumeration of specific categories, employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against *giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain'." (10 L. Ed. 2d 4)

The court went on to say that under the interpretation of the Federal Employees Compensation Act and under the interpretation of the Longshoremen's and Harbor Workers' Compensation Act:

"There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, *much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases.*" (10 L. Ed. 2d 5) (emphasis added)

It is readily apparent that the court has construed the federal statutes so as to limit the action against the employer to eliminate only those actions against the employer brought by the employee, his representatives and his dependents, because the enumeration of these parties appeared in the statute. This is certainly not the construction that can be given the Arizona Workmen's Compensation Act. The Arizona Workmen's Compensation Act does not even speak of who may bring the action against the employer. It deals only with the obligation of the employer. Section 23-906 A.R.S. states:

"Employers who comply with the provisions of Section 23-961 as to securing compensation *shall not be liable for damages at common law or by statute*, except as provided in this section, for injury or death of an employee wherever occurring, . . ." (Emphasis added)

It is to be emphasized that Section 23-1022 A.R.S., a separate statute, deals with the remedies of the employee and accordingly, the two statutes are to be distinguished, one dealing with the remedy of the employee and the one quoted above dealing with the obligations of the employer.

It should therefore be readily apparent that the analysis of the statutes in Ryan and Weyerhaeuser cannot apply to the Arizona Workmen's Compensation statutes and the employer in Arizona who complies with the terms of the Workmen's Compensation Act should not be liable to any third party on a claim of indemnity.

Similarly, a brief review of recent cases not reaching the Supreme Court reveals that the rule of the Ryan case is limited to admiralty cases.

In *Waterman Steamship Corporation v. David*, 353 F.2d 660 (5th Cir. 1965), the court recognized the unique rules which apply to maritime situations. The court said:

"The stevedore's 'warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.' Ryan, 350 U.S. at 133, 76 S.Ct. at 237. In a more recent case the Supreme Court, declining to take a bailment approach, (citing *Booth S.S. Co. v. Meier and Oelhaf Company*, 262 F.2d 310 (2nd Cir. 1958)), again noted that the considerations underlying the stevedore's warranty are the same as those which 'underlie a manufacturer's or seller's obligation to supply free of defects.' (citing authority) In Griffith's case, allowing indemnity, the Supreme Court held that 'the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based

on the stevedore's implied warranty of workmanlike service.' The Court said: 'Although in *Ryan* the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and non-negligent conduct alike . . . Liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury.' 376 U.S. at 319, 84 S. Ct. at 751" (353 F.2d 664)

This court, in *Huff v. Matson Navigation Company*, 338 F.2d 205 (9th Cir. 1964), has recognized the application of the principles enunciated in the *Ryan* case to maritime situations. Said the court:

There is another line of related decisions by the Supreme Court which, when considered with those to which we have just referred, disclose that the Court has been in the process of *molding rules in admiralty* calculated to provide increased protection for long-shoremen engaged in this hazardous occupation." (Citing authority, including *Ryan*, and *Italia Societa*.) (338 F.2d 210) (Emphasis supplied)

Quoting freely from the *Italia Societa* case, the court continued:

"The Court there (in the *Italia Societa* case) also expounded the rationale of this whole series of cases as follows: (376 U.S. p. 324, 84 S. Ct. p. 754) 'Where the shipowner is liable to the employees of the stevedoring company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. . . . We deal here with . . . an area where rather special rules governing the obligations and liability of shipowners prevail,

rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, (citing authority) we think our decision today is in furtherance of these objectives'. These objectives were stated in footnote 10, page 323 of that opinion, 84 S. Ct. at page 753, by quoting from *DeGioia v. United States Lines*, 2d Cir., 304 F.2d 421, 426 as follows: 'The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions best able to minimize the particular risk involved.' (338 F.2d 211)

That the rule of the *Ryan* case does not extend beyond the maritime context is clearly pointed out in *Halstead v. Norfolk and Western Railway Company*, *supra*, p. 21, wherein the court said:

"Under such circumstances, the *Moretz* case and the cases cited therein in support thereof, notably *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, afford no basis in law for a recovery under the facts of this case. In the *Ryan* case, the court found that the stevedoring company's agreement to perform stevedoring operations contained, of its essence, an agreement to indemnify the shipowner of the stevedoring company's service contract to stow the cargo properly and safely was not lived up to. *There, under maritime and admiralty law, where the historic rule of divided damages prevails, the court found a contract of indemnity to exist.* Here, however, no such rule prevails and *N & W* concedes, in its brief, the lack of express language creating a contract of indemnity; but it would, nevertheless, fashion one by implication from the relationship of

the parties with the aid of the statutes, rules and regulations applicable to rail carriers, hereinabove referred to. This theory necessary must bear close scrutiny, for to apply it to Black Rock would, in its effect, be forcing Black Rock to pay twice for the same industrial accident. Black Rock having already paid its contribution to the Workmen's Compensation Fund and the plaintiff having received the benefits thereof, before fostering a further economic burden on Black Rock, for the same industrial accident to its employee, its legal responsibility therefore must be made to clearly appear. Under such circumstances, it will not suffice to say, as N & W does here, that Black Rock is due to respond over simply because its employee was injured while engaged in the performance of an essential aspect of its business. . . ." (236 F. Supp. 187) (Emphasis added)

When asked to apply the Ryan rule to non-maritime situations, the 5th Circuit, applying Florida law, expressly limited the Ryan rule to maritime cases. In *General Dynamics Corporation v. Adams*, 340 F.2d 271 (5th Cir. 1965), the court said:

"We are here concerned with the Florida rule with respect to the right of indemnity for, while the right of proceed in a third party action is established by Federal rule, such right depends upon the existence of a state created liability. *Thus, the Supreme Court decisions in Maritime cases*, (citing Ryan, Weyerhaeuser and others) *recognizing the right of a shipowner to recover against a stevedoring company when successfully sued by an employee of the stevedoring concern, are not in point here.* Those cases deal principally with the non-delegable duty of a shipowner to maintain a seaworthy vessel, the breach of which makes him liable without proof of negligence. In each of the cases the act of the stevedoring firm against which the Supreme Court permitted the third party

action to proceed, constituted the element of unseaworthiness which fastened the vicarious liability on the shipowner." (340 F.2d 279, 280) (Emphasis added)

The court disallowed a third party claim against the employer of the injured parties.

In *Reid v. Royal Insurance Company*, 80 Nev. 137, 390 P.2d 45 (1964), again the court considered the extension of the Ryan doctrine beyond the maritime context, and refused to so extend the doctrine. Said the court:

"We hold that the doctrine of the Ryan case, having its origin in and being applied for the most part to maritime cases, should not be extended to the present situation. Accordingly, we hold that under the circumstances of this case, the contractor does not have a claim for relief against the subcontractor on the theory of indemnity implied in law. The confusion as to when the indemnity rule announced in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra, should be applied may be illustrated by a few citations. In Weyerhaeuser S.S. Co. v. Nacirema Co., supra, the unanimous opinion of the United States Supreme Court said: 'The question here involves the right to trial by jury under principles of maritime liability enunciated in Ryan . . . (Emphasis supplied)'" (390 P.2d 49)

It is clear that the rule in the Ryan case applies only in admiralty cases, and that such rule is not at all applicable to the present controversy.

CONCLUSION

In summary it can be readily recognized:

- (1) If there is no duty owed by the Government to the Plaintiffs, Merritt-Chapman & Scott Corporation, in addition to the Government, is entitled to judgment.

- (2) If there is a duty owed by the Government to the Plaintiffs, such duty must be based upon negligence of the Government, for which there can be no indemnity from Merritt-Chapman & Scott Corporation.

For the reasons set forth herein, the District Court erred in granting the motion to strike Merritt-Chapman & Scott Corporation's "additional defenses" to the third party complaint of the Government, and in failing to enter judgment on behalf of Merritt-Chapman & Scott Corporation in the third party complaint.

Respectfully submitted,

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN H. WESTOVER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK ROBERSON and WILLIAM RODGERS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellant,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellee.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES OF AMERICA

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20832, 20833 and 20834

JACK ROBERSON and WILLIAM RODGERS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellant,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellee.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTIONAL STATEMENT

Appellants Jack Roberson and William Rodgers (plaintiffs)
sought this action against the United States under the
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, to
obtain damages for personal injuries sustained when they fell

from a scaffold while working at the Glen Canyon Dam in Page, Arizona (TR 1-8).^{1/} The United States filed its answer to plaintiffs' complaint and a third-party complaint against their employer-Merritt-Chapman & Scott Corporation--demanding contractual indemnification for all sums which might be adjudged against it and in favor of plaintiffs (TR 9-11, 13-17). The United States moved for summary judgment against plaintiffs and, alternatively, to strike that portion of Merritt-Chapman & Scott's answer to its third-party complaint designated as "ADDITIONAL DEFENSES" (TR 18-22). The district court denied the motion for summary judgment and granted the motion to strike (TR 74). At the close of the plaintiffs' evidence, the United States moved for judgment in its favor. The district court granted that motion and dismissed plaintiffs' complaint and action on the merits and the United States' third-party complaint and action (TR 57, 74). Plaintiffs have appealed from the dismissal of their complaint and action (TR 58), and Merritt-Chapman & Scott has appealed from the failure of the district court to hold that it could not be liable to the Government for any portion of any judgment in favor of plaintiffs

^{1/} "TR" refers to Volume I of the Transcript of Record on these appeals. "TP" refers to the district court reporter's transcript of proceedings.

and against the Government, and the court's order granting the Government's motion to strike its affirmative defenses (TR 66).^{2/} The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291. By agreement between the parties and with the Court's consent, these appeals have been consolidated for purposes of briefing and oral argument.

COUNTERSTATEMENT OF THE CASE

1. The Underlying Facts.

In April 1957, the United States Department of the Interior's Bureau of Reclamation awarded Merritt-Chapman & Scott, an independent contractor,^{3/} a contract for about \$108,000,000, to construct and complete the Glen Canyon Dam, powerplant and appurtenant works on Government-owned land in Arizona and Utah (Defendant's Exhibit A).^{4/} The contract contained the following standard terms and conditions, among others (Defendant's Exhibit A):

GENERAL PROVISIONS (CONSTRUCTION CONTRACTS)

8. MATERIALS AND WORKMANSHIP

Unless otherwise specifically provided for in the specifications, all equipment, materials, and articles in-

^{2/} As a precautionary matter the United States has appealed from the dismissal of its third-party complaint. The purpose of that appeal is simply to preserve the Government's claim for indemnity against Merritt-Chapman & Scott in the event the judgment dismissing plaintiffs' complaint and action is set aside (TR 54, 65).

^{3/} It has been stipulated that Merritt-Chapman & Scott performed its work "in the capacity of an independent contractor" (TP 302).

^{4/} That exhibit was received in evidence and has been transmitted to this Court as a separate volume (TR 12, 32-35).

corporated in the work covered by this contract are to be new and of the most suitable grade of their respective kinds for the purpose and all workmanship shall be first class. * * *

9. INSPECTION

(a) * * * [A]ll material and workmanship, if not otherwise designated by the specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. * * *

* * * *

10. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

* * * He [the Contractor] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. * * *

SPECIFICATIONS

GENERAL CONDITIONS

* * * *

10. Accident prevention. The contractor shall, at all times, exercise reasonable precautions for the safety of

employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. The contractor shall also comply with the provisions of the Bureau of Reclamation publication "Safety Requirements for Construction by Contract," in effect on date bids are opened, so far as applicable, as determined by the contracting officer and unless such provisions are incompatible with Federal, State, or municipal laws or regulations. Monthly reports of all lost-time accidents shall be promptly submitted giving such data as may be prescribed by the contracting officer. Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.

* * * *

Plaintiffs, experienced ironworkers, were employed by Merritt-Chapman & Scott to perform construction work at the dam site in Page, Arizona (TP 276-277, 302, 408). On the day of the accident, April 15, 1964, plaintiffs were reassembling a large movable scaffold known as a "jumbo," which was then located in the dam's west diversion spillway tunnel, on an incline of 55 degrees and about 532 feet above the bed of the Colorado River (TR 2; TP 301, 306). At the time of the accident, 2:30 - 2:40 p.m., plaintiffs were standing on the jumbo's bottom platform, about 3-4 feet from its front edge (TP 47, 282-283, 285). Unlike the other levels of the jumbo, the platform on which plaintiffs were standing was not properly

equipped with handrails or toeboards, ^{5/} and it did not have front guardrails or a safety net (TR 53; TP 49, 58, 284-285, 301-302, 307-308, 416-417). (The reassembling work did not require the removal of any of those safety devices (TP 307-311, 356-359).) In addition, neither plaintiff was using a safety belt, although such belts were readily available for their use (TR 55; TP 62-63, 304-306, 425).

The accident occurred when plaintiff Roberson requested that the jumbo be moved up "just a little bit" to permit plaintiffs to continue reassembling the jumbo (TP 46, 286, 306). The jumbo moved up about 2-4 inches and then immediately slipped about 25 feet; plaintiffs fell from the platform on which they were standing (TP 48-49, 100-101, 286). Plaintiffs filed claims for workmen's compensation benefits with the Arizona Industrial Commission on account of personal injuries sustained in the accident (TR 33; TP 319).

The jumbo was operated through a cable connected with a hoist. The hoist was held in place by two other cables anchored to pins set in the tunnel's splitter wall. The slip of the jumbo was caused either by the improper setting or inadequate strength of one of the anchor pins (TR 53; TP 71-77, 183-186, 207-211, 246, 252-253, 367-370). There was no evidence that the quality or strength of the pin could be determined by

^{5/} Toeboards would prevent a person from falling underneath the jumbo (TP 397).

visual inspection in place, and it was not possible to observe whether the pin had been installed properly when the cable from the hoist covered the anchor pin (TP 143-144, 390-391, 449).

The jumbo and anchor pin were the property of Merritt-Chapman & Scott (TR 53; TP 423). The jumbo was assembled in the west spillway tunnel during the middle of March 1964 under the direction of plaintiff Jack Roberson, who was assisted by three other Merritt-Chapman & Scott employees (TP 162-163, 409-412, 421). Concerning the installation, Roberson testified that, while he never received drawings illustrating how to rig the jumbo, he discussed the matter with Merritt-Chapman & Scott's superintendent (TP 421-422); that he alone selected the place where the holes for the anchor pins were to be drilled and determined the angles at which those holes were to be drilled (TP 422, 426-427); that the size of the hole was determined by a Merritt-Chapman & Scott employee (TP 414-415); that he (Roberson) ordered the pins placed in the holes (TP 427); that the hole involved in the accident appeared to be "bigger" than its pin (TP 431); that he did not rig the jumbo with cables around the front of the bottom deck (TP 430); but that the installation of the hoist appeared safe to him (TP 427); and that after the installation, he checked the anchor pin "to see how it was acting" (TP 428).

When the jumbo was assembled, it was used by Merritt-Chapman & Scott grouters to put grout into the tunnel's

concrete walls (TP 416). According to the testimony of one Ben W. Mullins, a Merritt-Chapman & Scott grout foreman, the jumbo had wooden handrails when it was first used around March 15, 1964, which handrails broke off the front of the jumbo prior to the accident on April 15, 1964 (TP 372-373). Mullins also asserted that there were toeboards on the jumbo's front end at the time of its installation but not at the time of the accident (TP 375).

2. The District Court's Decision.

The district court (per Judge Walter E. Craig) found that the failure of the pin and lack of adequate **guardrails** or other safety appliances on the jumbo resulted in the injuries sustained by the plaintiffs (TR 53). It concluded that the fact that the Government voluntarily maintained its own safety program during the construction of the dam did not abrogate Merritt-Chapman & Scott's contractual undertaking "to maintain its own safety program for the protection of its employees" (TR 53-54). The court concluded further that, while the Government had a contractual right to inspect the premises under construction to assure itself that Merritt-Chapman & Scott complied with the required safety measures of the contract, it did not have a duty to do so, and that because "there was no duty on the part of the . . . Government to the plaintiffs, there could be no breach of a duty, and thus no liability under the provisions of the

Federal Tort Claims Act" (TR 53-54). The court noted that were it to find it necessary to reach a determination as to plaintiffs' contributory negligence (TR 55):

it would conclude that the evidence adduced at the trial disclosed that the plaintiffs, and each of them, were two experienced iron workers and were guilty of contributory negligence in working on the Jumbo, without the use of safety belts which were ready and available for their use, knowing that the Jumbo was to be moved.

Concerning the Government's third-party complaint and action against Merritt-Chapman & Scott, the court ruled that the contractor was not liable for indemnification under the contract for the reason that the Government was not liable to plaintiffs (TR 54).

ARGUMENT

SUMMARY

In Point I, infra, we show that plaintiffs have failed to prove a cause of action founded upon the Government's negligence. Plaintiffs urge that the Government owed them certain duties by reason of its retention of control of the work and its undertaking safety inspections and enforcement at the job site. These contentions are totally without merit. For the contract between the Government and Merritt-Chapman & Scott, plaintiffs' employer, did not retain in the Government any "control" of the work so as to create a duty of care on the part of the Government to plaintiffs. Kirk v. United States, 270 F. 2d 110 (C.A. 9);

Wallach v. United States, 291 F. 2d 69 (C.A. 2), certiorari dismissed, 368 U.S. 892, certiorari denied, 368 U.S. 935; Cannon v. United States, 328 F. 2d 763 (C.A. 7), certiorari denied, 379 U.S. 832; Buchanan v. United States, 305 F. 2d 738 (C.A. 8). In addition, the Government's maintenance of a safety program during construction did not of itself create a duty of care on its part to plaintiffs. Kirk v. United States, 270 F. 2d 110 (C.A. 9); Blaber v. United States, 332 F. 2d 629 (C.A. 2); Grogan v. United States, 341 F. 2d 39 (C.A. 6); United States v. Page, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979. Finally, plaintiffs failed to prove that the Government in fact exercised control or that its safety program subjected them to any increased risks.

In Point II, infra, we show that, if the Government were liable for plaintiffs' injuries, Merritt-Chapman & Scott would be required, by reason of its contract with the Government, to indemnify it. First: We demonstrate that federal, not state law determines the rights and liabilities of the Government and Merritt-Chapman & Scott. Clearfield Trust Co. v. United States, 318 U.S. 363; United States v. Allegheny County, 332 U.S. 174; Woodbury v. United States, 313 F. 2d 291 (C.A. 9). Second: We establish that the allegations in the Government's third-party complaint, if proved, would entitle it to contractual indemnity from Merritt-Chapman & Scott. Globig v. Greene & Gust Co., 201 F. Supp. 945 (E.D. Wisc.), adopted and affirmed sub nom. Globig v. Burton Plumbing-Heating Co., 313 F. 2d 202 (C.A. 7); Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 141 F. Supp. 833, 837-838

(N.D. Calif.); Porello v. United States, 94 F. Supp. 952
(S.D. N.Y.); Johnson v. United States, 133 F. Supp. 613
(E.D. N.C.). And third: We show that there is no merit
to the contractor's contention that Arizona's Workmen's
Compensation Act bars or limits the Government's claim for
contractual indemnity.

I

THE GOVERNMENT DID NOT BREACH ANY DUTIES IT MAY HAVE OWED TO PLAINTIFFS

Under the Federal Tort Claims Act, the United States may be held liable for personal injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The Act does not subject the United States to absolute liability without fault; rather, a negligent or wrongful act or omission of a Government employee is a necessary prerequisite for liability. See e.g., Dalehite v. United States, 346 U.S. 15, 44-45; Dushon v. United States, 243 F. 2d 451, 454 (C.A. 9), certiorari denied, 355 U.S. 933; United States v. Page, 350 F. 2d 28, 33-34 (C.A. 10), certiorari denied, 382 U.S. 979.

The accident here involved occurred in Arizona. And, according to that state's law, a cause of action founded upon negligence must be based upon a showing (1) that the defendant had a duty to protect the plaintiff from the injury of which he complains; (2) that the defendant failed to perform that duty; and (3) that such failure proximately caused the plaintiff's injury. Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 333, 372 P. 2d 333 (S. Ct.).

On their appeal, plaintiffs Roberson and Rodgers contend that the Government is liable to them under Arizona's law of negligence, primarily on two grounds: First, they argue, the Government retained and exercised control of the work, including the safety work on the dam, and it is liable because of its failure to exercise that control with reasonable care (Roberson and Rodgers Brief, pp. 20, 27-28). Second, they argue, the Government is liable because it negligently performed its voluntary undertakings to inspect and correct the hazardous rigging of the jumbo, and to correct violations of applicable safety requirements (Id., pp. 43, 46-48, 56).

As we show below, these contentions are totally without merit. As the district court correctly held, the Government did not breach any duty it may have owed to plaintiffs.

A. Neither the Contract Between the Government and Merritt-Chapman & Scott Nor the Government Safety Program Created Any Duties On the Part of the Government to Plaintiffs.

As indicated above, plaintiffs urge that the Government owed them certain duties by reason of (1) its retention of control of the work and (2) its undertaking safety inspections and enforcement at the job site. That argument is based on erroneous premises. For the Government did not by contract retain control so as to subject it to liability to these plaintiffs. And the Government's safety program did not of itself impose upon the Government any additional obligations

to plaintiffs.

1. The Government did not by contract "retain control" of the work entrusted to its independent contractor. "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second), Torts § 414.^{6/} In order for Section 414 to be applicable, however, "the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." Id., Comment c. For "[s]uch a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail." Ibid.

by contract

The Government did not/"retain control" of the work entrusted to Merritt-Chapman & Scott, its **independent contractor**, and therefore owed no duties to its contractor's employees,

^{6/} In the absence of prior decisions to the contrary, the Supreme Court of Arizona follows the application of the Restatement of the Law of Torts. MacNeil v. Perkins, 84 Ariz. 74, 81, 324 P. 2d 211 (S. Ct.).

including plaintiffs. Indeed, plaintiffs have not pointed and cannot point to a single contract provision reserving control to the Government. In fact, the standard contract here involved required the contractor to have a competent foreman or superintendent on the job at all times, with authority to act for it (General Provisions, 10). For under the contract, the contractor's representative, not the Government's, superintended the work on the dam.

Moreover, the fact that the contract gave the Government the right to inspect (General Provisions, 9) and the right to enforce compliance with applicable safety requirements (Specifications - General Conditions, 10) does not improve plaintiffs' position here. For it is well settled that such standard Government contract provisions do not constitute retention of control of the work so as to subject the United States to liability to workers on the job. Kirk v. United States, 270 F. 2d 110 (C.A. 9); Wallach v. United States, 291 F. 2d 69 (C.A. 2), certiorari dismissed, 368 U.S. 892, certiorari denied, 368 U.S. 935; Cannon v. United States, 328 F. 2d 763 (C.A. 7), certiorari denied, 379 U.S. 832;^{7/} Buchanan v. United States, 305 F. 2d 738 (C.A. 8).^{8/} As this Court stated in Kirk

^{7/} Cannon overruled Schmid v. United States, 273 F. 2d 172 (C.A. 7), cited by plaintiffs on page 26 of their brief.

^{8/} United States v. Pierce, 235 F. 2d 466 (C.A. 6), cited and relied on by plaintiffs on pages 23-26 of their brief, is not in point since the contract there expressly reserved control of the operations.

(270 F. 2d at 117):

* * * The fact that the United States retained the right to inspect the work under construction to see that the provisions of the contract were carried out and also retained the right to stop work if they were not is not sufficient in itself to make the United States liable for damages resulting from negligence of the contractors in their performance of the contract. *Gallagher v. United States Lines Co.*, 2 Cir., 206 F. 2d 177; *Alexander v. Frost Lumber Industries*, D.C., 88 F. Supp. 516, affirmed 5 Cir., 187 F. 2d 27; *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 285 P. 2d 902.

In short, the fact that Government inspectors inspected the work at the dam site and sought compliance with safety requirements did not place the Government in control of the work.

2. By conducting a safety program, the Government did not "undertake" to assure the safety of its contractor's employees. Nowhere in the contract between the Government and Merritt-Chapman & Scott did the Government obligate itself to look out for the safety of its contractor's employees. In fact, the contract states that "[t]he contractor shall, at all times, exercise reasonable precautions for the safety of employees . . ." (Specifications - General Conditions, 10). Nevertheless, plaintiffs argue that, because of its safety activities at the dam site, the Government somehow undertook to prevent accidents such as the one here involved. That argument, too, lacks merit. It was considered and rejected by this Court in Kirk v. United States, 270 F. 2d

110 (C.A. 9), and has been rejected by other courts of appeals as well. Blaber v. United States, 332 F. 2d 629 (C.A. 2); Grogan v. United States, 341 F. 2d 39 (C.A. 6); United States v. Page, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979. And see, Lipka v. United States, 369 F. 2d 288 (C.A. 2).

In Kirk, the decedent, an employee of independent contractors selected by the Government to do construction work at a dam in Idaho, fell from a scaffold into a river. The accident there occurred when the structure on which decedent was working collapsed due to the removal of some of the bolts holding it together. There were no safety nets under the scaffolding or other safety devices in or near the area where decedent fell into the river. Life preservers were available but had not been used, and decedent had failed to secure himself by attaching a rope to his safety belt. The Government there, as here, was represented on the construction project by inspectors whose duty it was to see that the contract provisions were complied with by the contractors, including the applicable safety provisions. The inspectors were unaware of the fact that the bolts had been removed.

In this Court, it was contended as plaintiffs urge here (270 F. 2d at 117):

that the United States was under a legal duty to Kirk to inspect and test the scaffold and movable forms and to carry out a continuous and comprehensive accident prevention and rescue program for

the protection not only of the employees of the United States but of the employees of the independent contractors. . . .

This Court rejected that contention, holding that there was no such legal duty, and expressed its agreement (270 F. 2d at 118) with the following statement which appeared in the memorandum decision of the trial court:

The voluntary assumption of such a program [accident prevention and safety program] for the welfare of all parties concerned should not create liability on the part of the defendant to the employees of contractors where the performance, or failure to perform, in no wise increases the hazard to the employees of the contractor beyond that which would otherwise have been present. Every Government employee must trace the duties of his job to some law, regulation, or order, but this does not mean that in every such case there is thereby established a duty of care on the part of the employee and the Government toward those who may be incidentally benefited if those duties are properly performed, or toward those who may be incidentally injured if those duties are not properly performed. 9/

9/ On pages 48-52 of their brief here, plaintiffs assert that the Government owed them certain non-delegable duties. That assertion is incorrect. First, under Arizona law, such non-delegable duties are not owed by an employer of an independent contractor to the contractor's employees. Welker v. Kennecott Copper Company, 1 Ariz. App. 395, 403 P. 2d 330 (C.A.). Second, the Federal Tort Claims Act does not subject the Government to vicarious liability for its independent contractor's negligent acts. Strangi v. United States, 211 F. 2d 305 (C.A. 5); Dushon v. United States, 243 F. 2d 451, 454 (C.A. 9), certiorari denied, 355 U.S. 933; United States v. Page, supra, 350 F. 2d at 33-34.

F. The Government Did Not in Fact Exercise "Control" Over the Work Or Subject Plaintiffs to Increased Hazards.

As we have shown above, neither the contract between the Government and Merritt-Chapman & Scott nor the Government safety program created any duties on the part of the Government to plaintiffs. We now show that the Government did not in fact exercise control over the work or by its safety program in fact subject plaintiffs to increased hazards--i.e., that the Government did not owe plaintiffs any duty on account of its conduct.

1. There is absolutely no evidence that Bureau of Reclamation personnel exercised control of any aspect of Merritt-Chapman & Scott's safety program. As the testimony of Reuben C. Gaulke, the Bureau's Safety and Management Officer at the dam site, demonstrates the purpose of the Bureau's safety program was to seek Merritt-Chapman & Scott's compliance with its safety requirements, not to assume responsibility for the contractor's operations (TP 109, 111, 137-138). Thus, Gaulke's assistant, one Dick Blake, gave him daily safety inspection reports and called violations of the Bureau's safety regulations to Merritt-Chapman & Scott's attention to enable it to take corrective actions (TP 119, 121-123, 404). For the Bureau's safety inspectors could not order Merritt-Chapman & Scott's employees to stop work and take corrective actions except in emergency situations (TP 144-145, 147-149). Moreover, those inspectors were not expert technicians--they did not possess sufficient knowledge to determine the tensile

strength of the anchor pin here involved (TP 142-143).

Gaulke's testimony was confirmed by several of plaintiffs' witnesses. For example, one Mark Weaver, a general foreman for Merritt-Chapman & Scott's ironworkers, acknowledged that the Bureau's inspectors did not themselves correct unsafe conditions or order the contractor's employees to do so; rather, corrections were made by the contractor's employees on the basis of written orders from the contractor concerning safety practices (TP 6-8, 15, 25-30). Indeed, only readily observable unsafe conditions were called to his (Weaver's) attention by Blake (TP 19). In addition, plaintiff William Rodgers admitted that he did not receive any instructions concerning safety from Bureau personnel and did not see or even know of any Bureau safety inspectors on the job (TP 282, 311-313).^{10/}

There is likewise no evidence of an act or omission of any Bureau employee which subjected plaintiffs to increased hazards beyond those which would otherwise have been present. Cf.

Kirk v. United States, supra, 270 F. 2d at 118. Bureau personnel did not permit the Bureau's safety program to displace Merritt-

^{10/} One Ben W. Mullins, a Merritt-Chapman & Scott grout foreman, and plaintiff Jack Roberson testified that prior to the accident Bureau work or grouting, not safety, inspectors occasionally instructed them to replace and/or repair sections of the jumbo's handrail (TP 362-363, 366, 377, 379, 384-387, 417-418). However, that testimony may not have been believed by the trial court, and in any event, hardly establishes Bureau control of safety on the jumbo.

Chapman & Scott's. Indeed, the testimony of plaintiffs' own witnesses disclosed that the contractor had been conducting an active safety program as was required of it under the contract: It had a weekly safety check of the jumbos (TP 10); held weekly safety meetings which were attended by plaintiff Jack Roberson as the foreman of his crew (TP 388, 424); made safety manuals accessible to its ironworkers (TP 16); and furnished safety devices, including safety belts, for work on the dam (TP 16).^{11/}

2. From the above, it is apparent that the Government neither assumed a duty to protect these plaintiffs from the injuries of which they complain, nor subjected them to increased hazards. The district court's failure to find liability on the part of the Government was not, as plaintiffs in effect argue, clearly erroneous. Rule 52(a), Fed.R.Civ.P. For plaintiffs' employer, not the Government, "had the primary responsibility for the safety of its employees; it had the direct control and supervision over them." United States v. Page, supra, 350 F. 2d at 31. It had the duty to install, inspect, maintain and operate the jumbo from which plaintiffs fell. While Bureau inspectors may have made periodic inspections to see that safety regulations were complied with, "[t]he fact of inspections alone does not

11/ Plaintiffs' assertion that "when the jumbo slipped just seven days prior to appellants' severe accident, the Government [became] totally aware of this hazardous condition" (Brief, p. 49), is not well-taken. The April 8, 1964 slipping incident "had nothing to do with the accident of the 15th of April" (TP 43-44, 55, 129).

establish the extent of the inspector's obligation." Blaber v. United States, supra, 332 F. 2d at 632.

For the foregoing reasons, we believe that the district court held correctly that the Government owed no duty to plaintiffs. However, even if the Government somehow breached a duty it owed to plaintiffs, their recovery here is barred by their own contributory negligence. Plaintiffs were experienced ironworkers (TP 276-277, 302-408). Yet, as the district court found, they stood on the jumbo platform without using readily available safety belts when they knew that the jumbo was about to be moved (TR 55; TP 16, 46-47, 62-63, 282-286, 304-306, 425). Indeed, plaintiff Jack Roberson admitted that he had used safety belts on other occasions while working in high places (TP 425).

Plaintiffs' assertion that safety belts could not be used here (Roberson and Rodgers Brief, p. 54), is refuted by Roberson's own testimony on direct examination (TP 416-417) and that of Mullins as well (TP 373-374, 395-397); plaintiffs could have attached belts to the cable or guardrails around the back of the platform on which they were then standing. And, plaintiffs' contention that Arizona's Employers Liability Law ^{12/}

12/ Ariz. Rev. Stat. Ann., § 23-801, et seq.

applies here (Id., p. 55), is wholly misplaced. For that law subjects the employer of an injured worker, not the employer of an independent contractor, to liability; it has no application here since plaintiffs were not employed by the Government.

II

THE GOVERNMENT'S THIRD-PARTY COMPLAINT STATED A CLAIM FOR CONTRACTUAL INDEMNITY UPON WHICH RELIEF COULD BE GRANTED

For the reasons stated in Point I, supra, this Court should affirm the district court's dismissal of plaintiffs' action against the United States. If it does so, it need not consider, of course, any of the questions involving the Government's claim for contractual indemnity from Merritt-Chapman & Scott. In this Point, however, we discuss what action the court should take respecting the other two appeals should it disagree with our position and set aside the judgment against the plaintiffs.

Merritt-Chapman & Scott has attempted to appeal from the failure of the district court to hold that it could not be liable to the Government for any portion of any judgment in favor of plaintiffs and against the Government, and the court's order granting the Government's motion to strike its affirmative defenses (TR 66). It is clear, however, that this Court lacks jurisdiction of that appeal--No. 20,834 here--for the reason that it is not from a "final" decision of the court below. 28 U.S.C. 1291. For the district court's final judgment only (1) dismissed

plaintiffs' complaint and action on the merits, and (2) dismissed the Government's third-party complaint and action against Merritt-Chapman & Scott (TR 57). The district court did not enter a final judgment adverse to Merritt-Chapman & Scott so as to permit it to appeal to this Court. Accordingly, Merritt-Chapman & Scott's appeal--No. 20,834--should be dismissed.

As a precautionary matter, however, the United States has appealed to this Court from the district court's dismissal of its third-party complaint and action (TR 65). The purpose of that appeal--No. 20,833 here--is simply to preserve the Government's claim for indemnity against Merritt-Chapman & Scott in the event the judgment dismissing plaintiffs' complaint and action is set aside. Since the contentions which Merritt-Chapman & Scott makes in its brief as appellant in No. 20,834 would--if meritorious--defeat the Government's claim for indemnity, we think that they can be considered as being advanced as an alternative basis for affirmance of the dismissal of the third-party complaint.^{13/} Accordingly, we now will address ourselves to those contentions and show that, in granting the Government's motion to strike that portion of Merritt-Chapman & Scott's answer to its third-party complaint

^{13/} The district court's dismissal of the third-party complaint was, of course, based solely on its dismissal of plaintiffs' complaint.

designated as "ADDITIONAL DEFENSES" (TR 18-22, 74), the district court correctly ruled in effect that that complaint stated a claim for contractual indemnity upon which relief could be granted.

A. Federal Law Determines the Rights and Liabilities of Parties to a Standard Government Contract.

Merritt-Chapman & Scott here assumes that Arizona law determines the rights and liabilities created by the standard contract between itself and the Government (Brief, pp. 14-17). That assumption is without merit. It is settled that federal, not state law determines the rights and liabilities of the parties to a standard Government construction contract such as the one here involved. Clearfield Trust Co. v. United States, 318 U.S. 363; United States v. Allegheny County, 332 U.S. 174.

In Allegheny County, for example, the Supreme Court had to decide whether title to property which was the subject of a contract between the United States and a contractor was to be determined according to state or federal law. The Court applied federal law and stated (322 U.S. at 183):

The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. * * *

Similarly, in Woodbury v. United States, 313 F. 2d 291 (C.A. 9), this Court noted that "the law to be applied in

construing or applying provisions of government contracts is federal, not state law." 313 F. 2d at 295. And, with specific reference to an indemnity agreement in a Government lease, the Court of Appeals for the Seventh Circuit ruled unequivocally that federal law determined the validity and scope of the indemnity provision. United States v. Starks, 239 F. 2d 544 (C.A. 7).^{14/}

B. The Allegations in the Government's Third-Party Complaint Entitle It to Relief Under Federal Law in Contractual Indemnity.

The Government's third-party complaint alleged that plaintiffs' injuries were caused or contributed to by Merritt-Chapman & Scott's fault, negligence or breach of contract in that it failed: to instruct plaintiffs properly and adequately as to the safe and prudent manner of performing their work; to supervise them properly and adequately; to provide and maintain an adequate, proper and safe place to work; to provide plaintiffs with properly constructed equipment to perform the work assigned to them; to inform plaintiffs adequately of any dangerous or hazardous conditions likely to injure them; and to perform its

^{14/} In fact, the Government probably stated a claim for contractual indemnity under Arizona law as well as under federal law. See, First National Bank of Arizona v. Otis Elevator Co., 2 Ariz. App. 80, 406 P. 2d 430 (C.A.), rehearing denied, 2 Ariz. App. 596, 411 P. 2d 34; Graver Tank & Manufacturing Company v. The Fluor Corporation Ltd., Ariz. App. _____, 421 P. 2d 909, 911-912 (C.A.).

work in a proper and careful manner (TR 14-15). Those allegations, if proved, would entitle the Government to relief under federal law in contractual indemnity on three separate and distinct bases.

1. The first count of the Government's third-party complaint sought full indemnification on the basis of the contractor's express undertaking to (TR 14-15):

be responsible for all damages to persons or property that occur as a result of [its] fault or negligence in connection with the prosecution of the work.

Merritt-Chapman & Scott contends in effect that this provision does not require it to indemnify the Government where damages result from its and the Government's negligence (Brief, pp. 24-28). However, negligence on the part of the indemnitee does not bar an action for contractual indemnity. Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563. And, at least three courts have held that indemnity may be had under the provision here involved even if the Government also was negligent. Globig v. Greene & Gust Co., 201 F. Supp. 945 (E.D. Wisc.), adopted and affirmed sub nom. Globig v. Burton Plumbing-Heating Co., 313 F. 2d 202 (C.A. 7); Porello v. United States, 94 F. Supp. 952 (S.D. N.Y.); Johnson v. United States, 133 F. Supp. 613 (E.D. N.C.).

In Globig, the plaintiff, an employee of a Government sub-sub-contractor, commenced a diversity action against Greene & Gust Co., the Government's prime contractor, and Burton Plumbing-Heating Co., a sub-contractor, for personal injuries sustained

in a fall in a housing unit which was owned by the Government and being remodeled by Greene and Gust Co. Burton then filed a third-party complaint for contribution against the Government under the Federal Tort Claims Act, and the Government cross-claimed against its prime contractor for indemnification. The district court found the defendants and the Government negligent. In particular, it found that the Government as owner of the place of employment failed to turn it over to the contractors in safe condition and failed to detect that the unsafe condition which occasioned plaintiff's fall had not been corrected by its contractor. The court therefore allowed the claim for contribution from the Government as a joint-tortfeasor. However, the court also granted the Government's cross-claim for indemnity for the reason, among others, that the contract there involved, like the contract here, required the contractor to be responsible "for all damages to persons that occur through his fault or negligence in connection with the prosecution of the work." 201 F. Supp. at 951-952. The court held that the Government's negligence was not a defense against its express contractual claim for indemnification. 201 F. Supp. at 953.

Here, Merritt-Chapman & Scott, not the Government, assumed by express agreement primary responsibility for the safety of plaintiffs in their work. It is hardly unfair to require it to indemnify the Government for losses it may sustain on account of Merritt-Chapman & Scott's failure to fulfill its primary

responsibilities. 15/

In short, as the district court recognized, the indemnity provision in the contract here involved gave the Government express protection against losses caused by Merritt-Chapman & Scott's negligence or fault. Should it become necessary for the Government to prove the allegations of its third-party complaint, which sets forth the acts and omissions of Merritt-Chapman & Scott that would warrant a recovery, it will, if it proves them, be entitled to indemnity from that contractor.

2. The second count of the Government's third-party complaint sought full indemnification on the basis of Merritt-Chapman & Scott's breach of its express contractual obligations: (a) to perform the work in strict accordance with the contract's general provisions, specifications, schedules, drawings, and conditions; (b) to comply with applicable safety requirements; (c) to provide new and suitable equipment, materials and articles for incorporation in the work and "first class" workmanship; and (d) to have a competent foreman or superintendent on the work at all times (TR 15-16). It is manifest that any recovery here by plaintiffs against the Government might well

15/ Merritt-Chapman & Scott's liability to the Government extends beyond damages incurred on account of its (Merritt-Chapman & Scott's) negligence. For it assumed responsibility for damages resulting also from its "fault," which means "any breach of warranty or obligation." Compania Transatlantica Espanola, S.A. v. Melendez Torres, 358 F. 2d 209, 213 (C.A. 1).

be a reasonably foreseeable consequence of Merritt-Chapman & Scott's breach of any one of those obligations. Thus, if the Government were liable for plaintiffs' personal injuries, it would be entitled to contract damages--indemnification--from Merritt-Chapman & Scott. Accord: Choate v. United States, 233 F. Supp. 463 (W.D. Okla.).

3. The third and final count of the third-party complaint set forth a claim for indemnification on the basis of Merritt-Chapman & Scott's breach of its contractual duties to perform the work properly and safely and to provide workmanlike service in its performance (TR 16-17). That count, too, stated a good cause of action.

It is now well established that contracts for the performance of services carry with them the implied undertaking that the promisor will execute his tasks with due care. Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124; Weyerhaeuser S.S. Co. v. Nacirema, supra. In other words, the obligor warrants the skill of his trade. Thus in Ryan, the Supreme Court held that breach of the promisor's warranty of safe performance entitled the promisee to recover an indemnity even in the absence of an express indemnity provision in the contract. In addition, under the principle of implied indemnity, negligence on the part of the indemnitee will not, as a matter of law, bar recovery. Weyerhaeuser S.S. Co. v. Nacirema, supra, 355 U.S. at 568-569; Italia Societa

Per Azioni Di Navigazione v. Oregon Stevedoring Co., 375 U.S. 315, 319-320.

These principles have been held applicable in non-maritime situations and apply here. Globig v. Greene & Gust Co., supra, 201 F. Supp. at 951-953; Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 141 F. Supp. 833, 837-838 (N.D. Calif.). Accord: General Electric Co. v. Moretz, 270 F. 2d 780 (C.A. 4), rehearing denied, 272 F. 2d 624, certiorari denied sub nom. The Mason & Dixon Lines, Inc. v. General Electric Co., 361 U.S. 964. For there is no distinction between the contractual obligations under the relevant stevedoring contracts, and the contract here involved.

Here, it is not necessary to imply a warranty of safe performance; it is expressly made by contract. For, as indicated above (pp. 3-5), Merritt-Chapman & Scott expressly undertook to "exercise reasonable precautions for the safety of employees in the performance of [the] contract;" to comply with applicable safety requirements; and to provide "first class" workmanship. ^{16/}

In these circumstances, the Government's third-party complaint, in setting forth allegations of Merritt-Chapman & Scott's breach of contractual responsibilities with respect to safety precautions and the supervision of plaintiffs, stated a cause of action entitling it to recover an implied

^{16/} In Weyerhaeuser S.S. Co. v. Nacirema Co., supra, the Supreme Court reaffirmed its interpretation of similar language in the Ryan contract and the contract there involved, as constituting "a contractual undertaking to [perform] 'with reasonable safety'" and to discharge "foreseeable damage resulting to the shipowner [contractee] from the contractor's improper performance." 355 U.S. at 565.

contractual indemnity for any sums it might have to pay plaintiffs on account of Merritt-Chapman & Scott's negligence and breach of duty.

C. Arizona's Workmen's Compensation Act Can Neither Bar Nor Limit the Government's Claim For Contractual Indemnity.

Finally, there is no merit to Merritt-Chapman & Scott's contention that Arizona's Workmen's Compensation Act, Ariz. Rev. Stat. Ann., § 23-901, et seq., somehow bars or limits its contractual liability to the Government (Brief, pp. 19-24, 35-36).

First: Under federal common law principles, the contractual obligations of a contractor to indemnify his principal where the contractor's negligence or fault causes him to sustain loss, are independent of any limitation on liability existing between the contractor and his injured employee who is covered by workmen's compensation insurance. This is the manifest import of Ryan, and the holding in that case has been reaffirmed numerous times. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 602-603. Thus, it is no defense to the Government's claim for contractual indemnity that Merritt-Chapman & Scott is not liable in tort to plaintiffs by reason of Arizona's Workmen's Compensation Act. For the contractual obligations here involved run from Merritt-Chapman & Scott to the Government; they cannot be defeated or limited by a defense of workmen's compensation which Merritt-

Chapman & Scott might assert against the plaintiffs under Arizona law.

Second: Employers who comply with the provisions of Arizona's Workmen's Compensation Act as to securing compensation, "shall not be liable for damages at common law or by statute . . . for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation . . . or to reject the provisions of this chapter and retain the right to sue the employer as provided by law." Ariz. Rev. Stat. Ann., § 23-906. While there do not appear to be any Arizona decisions on the question whether the language grants the employer immunity for all causes of action growing out of an accident, regardless of the question of independent breach of duty, a majority of courts have held that similar language does not grant the employer any such immunity. See, 2 Larson's Workmen's Compensation Law (1961 ed.), § 76.30 and cases there cited. For as indicated by the above-quoted language in Arizona's Act, the immunity conferred is only as against actions for damages on account of the employee's injury. Here, the Government's action for indemnity is based on independent contractual duties owed by Merritt-Chapman & Scott to it. Thus, Arizona's Compensation Act would not operate as a bar or limit here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed. However, in the event the dismissal of plaintiffs' complaint and action is set aside, the dismissal of the United States' third-party complaint and action should likewise be set aside and the entire case remanded for further proceedings. In all events, the appeal in No. 20,834 should be dismissed for lack of jurisdiction.

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FEBRUARY 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



HOWARD J. KASHNER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK ROBERSON and WILLIAM RODGERS,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20832

UNITED STATES OF AMERICA,

Appellant,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Appellee.

No. 20833

MERRITT-CHAPMAN & SCOTT CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20834

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No. 20832

UNITED STATES OF AMERICA,

Appellant,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Appellee.

No. 20833

MERRITT-CHAPMAN & SCOTT CORPORATION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20834

REPLY BRIEF OF APPELLANTS ROBERSON
AND RODGERS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PREFACE

Appellants' reply will be addressed to the arguments contained in the answering briefs of the "Government" and the "Contractor" to the extent that they discuss matters raised in appellants' opening brief.

The Government's treatment of this aspect of the case is found at pages 1-23 of its brief; the Contractor's is found at pages 3-12 of its brief.

At the threshold of our argument, we deem it of the highest importance to assert that, although this is an appeal from a judgment of the District Court entered upon findings of fact and conclusions of law pursuant to Rule 52(a) of the Rules of Civil Procedure, such findings should not be deemed conclusive because, as will appear from the argument, references to the transcript, and applicable law, such findings were made by the trial judge under an erroneous view of the law.

There are two well established principles of

law which should apply to the consideration of this appeal:

1. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L. Ed. 746 (1948); and

2. A finding is "clearly erroneous" where it is induced by an erroneous view of the law. Galena Oakes Corp. v. Scofield, 218 F.2d 217 (5th Cir. 1954).

A reading of that portion of the transcript in which the findings of the trial court are made (Tr.* 447-450) will reveal that the trial judge plainly stated: "The court, it might be added, is impressed with the reasoning in the following cases, among other cases: Kirk v. U.S., 270 F.2d 110; and Grogan v. U.S., 341 F.2d 39." (Tr. 450). These cases hold that the initiation of a safety program and the conduct of periodic inspections by

* "Tr." denotes Transcript of Record.

the government will not render it liable under the Federal Tort Claims Act for injuries sustained by an employee on the job as a result of the contractor's negligence. Neither of the foregoing cases deals with a contract where the government actually retains control over a substantial portion of the work or of the safety program implemented in connection therewith.

Both the Government and the Contractor rely on the holdings of the two latter cases, which in our respectful submission controlled the decision of the trial court, and urge that the rules laid down therein are dispositive of this appeal.

Manifestly, the court below was in error, since both Kirk and Grogan, supra, are inapposite. The facts of the instant case on appeal are clearly distinguishable. The facts giving rise to these distinctions are undisputed, documented and clearly shown in the evidence as follows:

1. The Government, by contract provision, retained control over the manner and performance of that phase of the work upon the dam known and described in the plans and specifications as

"PRESSURE GROUTING," by reason of which its duties to exercise due care for the safety of the employees of the Contractor in this hazardous operation were not delegable.

2. Under well settled Arizona law, an owner, having exercised control over the details of the "pressure grouting" operation and over the safety program with respect thereto, has a duty to protect workmen employed on the job, and to prudently exercise such controls retained over the performance of the work and the jobsite.

3. The failure of the Government to prudently exercise adequate controls over the equipment, working conditions and safety precautions with respect to the grouting operations was the proximate cause of the injuries sustained by appellants herein.

In connection with the foregoing statements, we deem it important that this court be apprised of the provisions of the contract (Defendant's Exhibit A in evidence), having reference to the "PRESSURE GROUTING" requirements contained therein. The court's attention is directed to Volume 1 of the "Schedule, General Provisions, Specifications

and Drawings" of the Glen Canyon Dam and Power Plant promulgated by the United States Department of the Interior, Bureau of Reclamation, for this project. The specifications for "PRESSURE GROUTING" include paragraphs 72 through 81; commencing at page 64 of said volume and continuing through and including page 78.*

At the time of the accident, the "PRESSURE GROUTING" operation was in progress in the west spillway tunnel at a height of approximately 532 feet above the Colorado River. "Pressure Grouting" is done by drilling what are called "grout holes" through the walls of the spillway tunnel into the surrounding rock, and thereafter forcing a cement and water mixture under pressure into the spaces and holes between the rock face and the outside of the tunnel wall. As shown by the Specifications, the number, location, depth and direction of these grout holes are controlled exclusively by the contracting officer or his representative, and require that drills, drill bits, pumps and pumping equipment be located and maintained within the tunnel itself

* Reproduced verbatim in Appendix pp. A1-23.

and along its entire course from top to bottom. The drilling and grouting equipment, the grout material, and the men engaged in the performance of the work, together with the Government inspectors and engineers, are carried upon a type of scaffold or platform which has been described in the evidence and in the briefs of the parties as the "jumbo." The "jumbo" was initially designed with safety features such as wire mesh fence around it; safety nets were slung underneath to catch falling objects or workmen; handrails were also attached and toe boards were constructed to prevent the workmen from falling off of or under the jumbo. Because the Government retained the absolute control over the location and direction of the grout holes, certain portions of the jumbo had to be removed from time to time, and it will be demonstrated that in certain instances a handrail would have to be removed because it interfered with the drilling of a grout hole, placed at such a point by the Government. In like manner, certain safety cables and/or the wire mesh fencing would have to be removed because they interfered with the

placement of the drill at the location of the grout hole required to be drilled by the contracting officer or his representatives. Toe boards were removed to allow placement of a ladder and other structures on the jumbo floor in carrying out the work under the direction and supervision of the Government agents.

The "Government" and the "Contractor" utterly ignore the provisions of the contract and features thereof described above which gave the Government absolute control of the pressure grouting operations. It is for this reason that we assert here that the trial court decided this case upon an erroneous view of the law for, if the Government retained control of such operations, its duty to exercise due care in the performance of the work and for the safety of the workmen cannot be denied, nor could this duty be delegated to the Contractor.

Under the circumstances outlined above, and more particularly demonstrated in our argument, it is submitted that the judgment entered in the case must be reversed and the case remanded for further proceedings in the trial court below.

A R G U M E N T

1. The Government, by contract, "retained control" over the manner and performance of the "pressure grouting" operation and thereby was under a duty to exercise reasonable care for the safety of appellants.
-

Counsel for the Government, at pages 9-10, 13-14 of its answering brief, reiterates that the Government did not retain "control" over any of the work so as to subject it to liability by appellants. At page 15 we are challenged to point out contract provisions whereby the Government retained control over the work. Appellants accept this challenge and demonstrate that the Government's position is palpably erroneous with respect to the "PRESSURE GROUTING" operations.

A careful reading of each of the paragraphs, reference to pressure grouting, contained in the contract and set forth in the appendix hereto will clearly reveal that, as to this feature of the contract, the Government was in absolute control of the performance of this work and, of necessity, not only controlled the workmen on the job, but also the method and means by which the grouting

procedures were carried out.

These procedures and the Government's control thereof actually resulted in the unsafe condition of the jumbo at the time of the accident, since it is admitted that there were no toe boards, hand-rails, or safety netting in place in the front of the jumbo at the time it dropped out from under the two injured employees, appellants here.

For instance, Truman Barlow, an eyewitness to the accident, who was on the jumbo at the time, testified that he was employed as a laborer for the "Contractor" engaged in "grouting off of it" (Tr. 87). He also ran the jackhammer drilling holes (Tr. 89). On cross-examination, he stated:

"A I was a grouter. When this took place -- And when you say move the jumbo, sometimes we move it two feet and grout for a whole day; sometimes we move it twenty feet; sometimes back and forth. It just doesn't all take place -- I mean, you just don't move the jumbo a long ways and then grout for some time; it's all done simultaneously." (Tr. 92)

The Government cannot disassociate the grouting operation from the condition of the jumbo or the rigging thereof because this same witness also testified:

"A Well, it isn't exactly the way you make it sound. You just about have to be there to understand it. Jack and the boys do the rigging, at the same time we can be grouting, and this jumbo can be being worked on at the same time we can be grouting off of it." (Tr. 93)

Additionally, the witness Ben W. Mullins, a grout foreman for the Contractor, testified:

"Q All right. Up until that time, when was the last time you grouted off of that jumbo?

A Well, we had finished this grouting and then they pulled it up to take the sandwich out of the sections and -- I don't know -- a day or two -- I'm not sure.

Q It has been testified here by Mr. Sexton that it was put in around the 15th of March, 1964. There, I take it that it had been in the use of grouting for almost a month, with the exceptions of the center section coming out, which took a couple of days, one or two days, is that right?

A Yes.

Q During that month did you work on it as a grouting supervisor?

A Yes." * * * (Tr. 372)

And it was during these grouting operations that the handrails were broken off (Tr. 373). No cable rails were up, nor was there any wire screening around the front of the jumbo (Tr. 373).

"Q When was the last time you saw them on there prior to the accident? I mean the toe boards on the front of the lower platform on the upstream side?

* * *

A I couldn't say definite. They were just knocked off, and this and that and the other." (Tr. 375)

On cross-examination this witness testified to the removal of safety cables and handrails when their presence interfered with the drilling and grouting operations; also to the fact that the Government inspectors directed their replacement (Tr. 387-88).

James Sexton, an ironworker for the Contractor, testified that when this identical jumbo was in the east spillway, "it got pretty well tore up."

"Q What do you mean, it got tore up? What would tear it up?

A Well, if a piece of handrail or this chain link fence that we had across here, if it was in the way it would have to be removed to get the -- they used air drills or core drills for drilling into this concrete tunnel, and they were quite long, you know, the shafts on them, and if they were in the way they would have to be removed, and they didn't get replaced like they should.

* * *

Q Mr. Sexton, with respect to that jumbo, can you see any toeboards on it?

A No. The toeboards, they were underneath the jumbo. These two angles that are there, that's what they were bolted onto. But, they had been removed -- well, we put them back on I think maybe once, but they had been removed because it was in the way of some kind of scaffolding they had to get on right at the floor, and they just didn't put them back on." (Tr. 155-57)

The deposition of Eugene B. Anderson, a supervisory construction engineer for the Government, was admitted into evidence (Tr. 402). This witness was the chief of grouting operations at Glen Canyon Dam at the time of the accident in question (Tr. 139);(Anderson depo. 4). It is significant that he looked at the pin which held the jumbo about a week or ten days prior to the date of the accident (Anderson depo. 5). He had inspected the cause of the prior slipping of the jumbo which had occurred on April 8 or 9 (Anderson depo. 6). He admitted that the jumbo should not have been rigged to one pin. He stated: "That should never have been done. That was the way it was rigged up. We had not accepted it for working, for a working platform yet at the time." (Anderson depo. 12). He had looked at the pin many times (Anderson depo. 19) and knew

that the pin bent from too heavy a load on it (Anderson depo. 22). Notwithstanding his actual knowledge of the dangers inherent in the rigging of the jumbo, he testified that he and his men had ordered the jumbo to be cleaned up on account of the "mess" that was on it:

"Q Who is 'we'?

A Well, I and my inspectors, Ralph Lane, and after all, you have a bunch of hoses. You have some pumps, pipes, drills and everything, just to tidy up a little bit, just do a little bit of housecleaning." (Anderson depo. 16).

It is undisputed that three or four laborers, including the witness Barlow, were on the jumbo during the cleanup work. Mr. Anderson testified further:

"Q Well, would you have gotten on the jumbo?

A I don't believe so. If I had -- if I had -- because I would have looked the situation over first. And I think I would have recommended to the Contractor that -- I would have brought the question up to him, anyway, as to the adequacy of his rigging.

Q Then, I take it because of the rigging that existed prior to the accident between the 8th and the 15th, you personally wouldn't have gone down on that jumbo?

A No, I wouldn't go down on that jumbo,

and I wouldn't want any of my men down there when they are rigging on the jumbo or making any big moves on the jumbo.

Q Why would you let a cleaner go down there or laborer?

A They are contractor's personnel.

Q I mean, he is still a human being.

A Yes, but we are just -- the engineers on the job. The contractor is constructing the job, of course."
(Anderson depo. 25-26)

The foregoing testimony clearly demonstrates that the Government's retention of control over the grouting operation not only was the cause of the dangerous condition of the jumbo, but also that its employees, knowing full well that said jumbo was rigged in an unsafe and dangerous manner (without handrails, safety nets, toe boards or safety cables), ordered and required the Contractor's workmen, including appellants, to work thereon at a height of 532 feet above the river, and to grout or do cleanup when said jumbo was in such perilous condition. This constitutes an utter abandonment of the duty of the Government under the circumstances shown by the evidence. To appreciate the

attitude of the Government while the jumbo was installed in the west spillway, this court's attention is directed to Anderson's entire deposition which was admitted into evidence by the trial judge (Tr. 402), (although it does not appear that the clerk has marked the same as an exhibit). Anderson's apparent indifference to the safety of the men working on the jumbo is contrary to all of the law cited and quoted in appellants' opening brief at pages 23-43 thereof to which reference is hereby made.

In the light of the total evidence on this aspect of the case, we feel that this court will be "left with a definite and firm conviction that a mistake has been committed," rendering the findings of the court clearly erroneous. Furthermore, this same evidence shows that the finding of the trial court reference to the duty of the Government to appellants herein was induced by "an erroneous view of the law." In either case, the findings insofar as they deal with the Government's duties to appellants must be set aside under the rules set forth in United States v. U. S. Gypsum Co.,

and Galena Oakes Corp. v. Scofield, supra. The findings being erroneous, the judgment cannot stand.

2. Under well settled Arizona law, an owner, having exercised control over the details of the "pressure grouting" operation and over the safety program with respect thereto, has a duty to protect workmen employed on the job and to prudently exercise such controls retained over the performance of the work and the jobsite.

Arizona law classifies this type of work as a hazardous occupation (see § 23-803, A.R.S. quoted in pertinent parts at pp. 55-56 of appellants' opening brief) to the effect that all work performed on ladders or scaffolds of any kind elevated 20 feet or more above the surface constitutes a hazardous occupation. The hazardous nature of the work was recognized by Eugene B. Anderson at page 38 of his deposition and, of course, was recognized by the Government itself (see Plaintiffs' Exhibit 8 quoted in pertinent part at pages 21-22-23 of appellants' opening brief).

Not only was the nature of the work hazardous, but that hazard was increased by reason of the Government's control of the grouting operations which

at times required dismantling or destruction of parts of the jumbo to enable the workers on the platform to drill the grout holes and grout the same at the points and places directed and specified by Government employees. These employees, by reason of the critical nature of this work, had unbridled discretion to cause the grout holes to be drilled through the concrete and steel of the tunnel itself in any direction, to any depth up to 360 feet, and at any place within the tunnel, regardless that portions of the jumbo devoted to the safety of the men had to be removed or destroyed to enable the same to be done.

Given these circumstances, the Arizona decision in Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330, becomes controlling upon this court.

An excerpt from this decision is found at pages 42-43 of appellants' opening brief and additional quotations will not be made therefrom. Accord, Fluor Corp. v. Sykes, 3 Ariz. App. 211, 413 P.2d 270.

The effect of Welker v. Kennecott Copper Co., supra, requires that an owner who has undertaken a

program for the safety and protection of employees engaged in hazardous work must exercise due care for the protection of such employees, and that the failure to do so may impose liability. In this case, it is unquestioned that the Government had initiated and conducted extensive safety procedures. The safety inspectors, as noted in our opening brief, at times undertook to direct the Contractor's employees reference to safety measures during the course of construction. Apparently, the Government employees did not extend the practice and protection afforded to the employees at the time the jumbo hung perilously suspended by one cable and hoist anchored by a single pin which yielded and bent due to excessive weight, casting these appellants into the air 532 feet above the river bed.

3. The failure of the Government to prudently exercise adequate controls over the equipment, working conditions and safety precautions with respect to the grouting operations was the proximate cause of the injuries sustained by appellants herein.

Undoubtedly, the Government's failure to exercise due care for the protection of appellants



proximately caused their injury and damage. The only remaining point to be discussed is whether or not the contributory negligence of either of these workmen is a bar to recovery.

Under the Employer's Liability Law, § 23-806, contributory negligence is not a bar to recovery. This section implements the doctrine of comparative negligence under which, of course, if the court finds that appellants here were guilty of some element of contributory negligence, which we do not concede, this factor may be considered in reduction of the amount of the award.

Furthermore, if, as argued at pages 22-23 of the Government's brief, this law only subjects the employer of an injured worker to liability, such liability is extended to the Government, for under the Rule of Non-Delegable Duty, the independent contractor is deemed to be the agent of the government, and the doctrine of respondeat superior applies.

C O N C L U S I O N

For all of the reasons expressed herein, it is

submitted that the judgment appealed from should be vacated, the case reversed and remanded with directions to grant the appellants a new trial.

Respectfully submitted,

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles M. Brewer

A P P E N D I X

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Appendix

PRESSURE GROUTING

72. General plan for grouting. The general plan for grouting the rock foundations for structures and for grouting contraction joints in the structures requires that the contractor perform drilling and grouting operations as follows:

(a) Drilling and grouting the rock foundations of the dam and spillway intake structures with low-pressure, shallow grout holes.

(b) Drilling and grouting the rock foundations of the dam with high-pressure, deep curtain, grout holes.

(c) Drilling and grouting the rock surrounding the spillway tunnels and around the diversion tunnel plugs.

(d) Periphery and perimeter grouting around the diversion tunnel plugs, and periphery grouting around the backfill concrete downstream from the diversion tunnel plugs.

(e) Drilling and grouting portions of the rock on both abutments from foundation tunnels. Grout pipe shall also be embedded in the floor of the foundation tunnels at 10-foot centers for future grouting operations beyond the profile of the grout holes shown on the drawings.

(f) Grouting transverse contraction joints 3-4 to 22-23, inclusive, in the dam, all longitudinal contraction joints in the dam, the contraction joints in the diversion tunnel plugs and backfill concrete, and the contraction joints between the tunnel plugs and backfill concrete. Grouting of transverse contraction joints 1-2, 2-3, 23-24, and 24-25 will not be accomplished under this contract.

(g) Placing mortar or grout by the grouting method to complete the placement of concrete lining for the right diversion tunnel outside the limits of the tunnel plug.

(h) Grouting the joints between the second-stage concrete in the ring-follower gate chambers and the surrounding mass concrete.

(i) Drilling and/or grouting at other locations as shown on the drawings or as directed.

The low-pressure, shallow holes are designated on the drawings as B-holes and the high-pressure, deep holes as A-holes. Before any concrete is placed in the dam or in the spillway intake structures, respectively, the near-surface rock of the dam and intake structure foundations, respectively, shall be grouted by means of the B-holes to depths of about 25 feet. Drilling and grouting may be required in the powerplant foundation to seal major surface seams, cracks, crevices, and channels or caverns in the rock. The number and spacing of the B-holes, and the pressures and grout mixes to be used for injections will depend upon the nature of the rock, as disclosed by the foundation excavation, the results of water pressure or other tests, and the results of the actual grouting operations. The main cut-off or grout curtain will be completed by high pressure grouting of the deep A-holes. The drilling and grouting of the A-holes shall be done from the foundation galleries in the dam, from the foundation tunnels, and from other locations as directed. It is contemplated that the A-holes will be drilled at approximately 10-foot spacings and to varying depths, as shown on the drawings, generally up to a depth of 250 feet. If foundation conditions, as revealed by the foundation excavation and the results of grouting operations, indicate that grouting to closer spacings and greater depths is necessary, the contractor will be required to drill some or any number of the holes to 5-foot spacings and to maximum depths of 360 feet and to grout these holes under relatively high pressures as directed.

The amount of drilling and pressure grouting that will be required under this contract is uncertain, and the contractor shall be entitled to no extra compensation above the unit prices bid in the schedule by reason of increased or decreased

quantities, or by reason of the location of the required drilling and grouting.

The work and materials for drilling, hook-up to holes, piping, pressure grouting, and any other work required for placing mortar or grout by the grouting method, to fill the spaces in arches remaining unfilled after the placing of concrete has otherwise been completed, as provided in Paragraph 128, will not be paid for under items of the schedule for pressure grouting operations where the contractor has performed the required excavation, such as for the left diversion tunnel lining, the right diversion tunnel lining within the limits of the tunnel plug, and the inclined portions of the left and right spillway tunnel linings; and the costs thereof shall be included in the prices bid in the schedule for concrete lining. The work and materials for drilling, hook-up to holes, piping, pressure grouting, and any other work required for placing mortar or grout by the grouting method will be paid for under applicable items of the schedule covering pressure grouting operations where the excavation was accomplished under separate contract, such as in the right diversion tunnel outside the limits of the diversion tunnel plug.

73. Core drilling. The contractor shall, where and if directed by the contracting officer, perform such core drilling as may be required to determine the condition of the foundation rock, or the effectiveness of the grouting operations. The requirement for core drilling and the amount thereof will be optional with the contracting officer, and the contractor shall be entitled to no additional allowance above the unit prices bid in the schedule for core drilling NX-holes, and for core drilling 5 and 1/2 inch diameter holes by reason of the location, depth, or a larger amount of or none of this work being required. It may be required that the contractor shall core drill holes from the galleries or tunnels through concrete and steel and into rock. The NX-holes shall not be less than 2 and 15/16 inches in diameter and shall produce cores not less than 2 and 1/16 inches in diameter. All

core drilling NX-holes shall be performed with standard core-drilling equipment, using NX-size bits and double-tube core barrels, and capable to producing cores of the diameter specified. The NX-holes will be required to be drilled to varying depths, with a maximum depth of 200 feet. The 5 and 1/2-inch diameter holes shall produce cores not less than 4 inches in diameter and will be required to be drilled to a depth of not more than 50 feet.

All core drilling shall be performed in a workmanlike manner, by competent and experienced workmen, and special care shall be exercised to obtain cores in as good condition as possible from all holes in material capable of producing satisfactory cores. The drill bit shall be pulled, and the core removed as often as may be necessary to secure the maximum possible amount of core. The contractor shall keep, in the manner prescribed by and shall furnish to the contracting officer, an accurate log of all drill holes, including full descriptions of all materials of whatever character encountered in the drilling, their location in the holes, and the location of special features such as mud seams, open cracks, soft or broken ground, points where abnormal loss of drill water occurred, and any other items of interest in connection with the purpose for which the core drilling is required. The fact that an inspector may be present and keeping a record of the drilling shall not relieve the contractor from the requirement for keeping an accurate log as described above. Wooden core boxes shall be furnished by the contractor. The contractor shall place the cores in the boxes in the correct sequence and segregated accurately by labeled wooden blocks according to the measured distances in the holes. No box shall contain cores from more than one hole. Designating marks, hole numbers, and elevations shall be placed on the boxes and along the line of cores as directed by the contracting officer. The covers shall be fastened securely to the core boxes, and the boxes shall be delivered to the contracting officer at a point designated in the vicinity of the work.

Core drilling will be measured for payment to the actual depth, up to the depth directed, of holes drilled at the direction of the contracting officer. Payment for core drilling described in this paragraph will be made at the applicable unit price per linear foot bid in the schedule for core drilling NX-holes in stage between the depths specified in the schedule, and for core drilling 5 and 1/2-inch diameter holes not more than 50 feet deep, which unit prices shall include the cost of furnishing all labor, materials, tools, and equipment required for drilling the holes; removing the cores; keeping accurate logs of drill holes; boxing and labeling and transporting the cores; and all incidental work connected therewith.

74. Drilling grout holes. Grout holes shall be drilled into the rock foundations at the locations shown on the drawings and as described in Paragraph 72. The use of "rod dope," grease, or other lubricants on the drill rods or in the grout holes will not be permitted. Drilling grout holes with percussion-type drills will not be permitted. The requirement as to depth, spacing, and direction of holes are approximate and subject to revision during the work of drilling, testing, and grouting. It is expected that the required depth of holes will not exceed 360 feet.

Where and if grout holes are required to be drilled to a greater depth than 360 feet, the contractor will not be required to perform drilling beyond such depth at the unit prices bid in the schedule, and payment therefor will be made as provided in Paragraph 7. The location, direction, order of drilling and depth of each hole shall be as shown on the drawings, or as directed by the contracting officer.

The drilling and grouting of A-holes shall be done from the foundation gallery and from the foundation tunnels in the abutments through 1 and 1/2-inch diameter pipe placed into the concrete or rock a minimum of 12 inches, when drilling from the foundation tunnel, and into the concrete a minimum of

24 inches or to the top of the pour lift, when drilling from the gallery. Payment for furnishing pipe and fittings for grouting will be made in accordance with provisions in Paragraph 75.

The minimum diameter of each grout hole shall be not less than that produced by the commercial standard EX-size drill bit, approximately 1 and 1/2 inches. Unless otherwise directed by the contracting officer, the first A and B grout holes under the dam, the first B-holes under the spillway intake structures, and the first rings of grout holes and the first grout holes within each grout ring in the tunnels shall be spaced widely and shall be drilled and grouted before intermediate holes are drilled and grouted, and in this manner the drilling and grouting of all holes, and rings of holes, and the holes within each ring shall be completed with such final spacing of rings and holes as the grouting results show to be necessary. After holes in a region have been drilled and grouted, it may be found necessary to drill additional grout holes. No allowance above the unit prices bid in the schedule will be made for the drilling of such holes or for the expense of moving equipment to other operations and returning to a previously drilled area.

Wherever necessary, as determined by the contracting officer, the drilling and grouting shall be performed in successive operations consisting in each case of drilling the hole to a limited depth, grouting at that depth, cleaning out the grout hole by washing or other suitable means before the grout in the hole has set sufficiently to require redrilling, allowing the grout surrounding the grout hole to attain its initial set, drilling the hole to an additional depth, and then grouting, and thus successively drilling and grouting the hole at various depths within the stages until the required depth of hole is completely drilled and grouted, all as determined by the contracting officer. Redrilling required because of the contractor's failure to clean out a hole before the grout has set shall be performed at the contractor's expense.

Where the grout has been allowed to set in a hole by direction of the contracting officer, the required redrilling will be paid for at the rate of fifty percent (50%) of the unit price per linear foot bid in the schedule for drilling grout holes in stage between depths of 0 foot and 30 feet, regardless of depth. No additional allowance above the unit prices bid in the schedule for drilling grout holes in stage will be made on account of the requirement for interrupting the drilling of holes to permit grouting, on account of the requirement for cleaning out holes before further drilling or on account of any amount of moving of equipment that may be necessary due to the requirement for such successive shallow depth and deeper grouting.

As the construction work progresses, the development of leakage or the condition of the surrounding foundations may indicate that parts of the foundations already covered with concrete require grouting, in which event holes shall be drilled through the concrete and steel and into the underlying or surrounding rock. Pipes for grout connections shall be placed as directed.

Prior to drilling for grouting the formations surrounding the spillway tunnels, including those portions of the diversion tunnels which will ultimately be parts of the spillway tunnels, and the keyed portions of the diversion tunnels, as described in Paragraph 72, the contractor shall complete the placing of concrete lining and the work of placing mortar or grout by the grouting method as provided in Paragraph 128.

When the drilling of each hole has been completed, it shall be protected from becoming clogged or obstructed by being temporarily capped or otherwise suitably protected until it is grouted, and any hole that becomes obstructed before it is grouted shall be opened by and at the expense of the contractor. For determining stage depths of drilling grout holes in rock and concrete measurement will be made from the collar of the hole at the exposed surface of the rock or concrete to the actual depth drilled

into the rock foundation and concrete as directed. Grout holes for pressure grouting will be measured for payment to the actual depth, up to the depth directed, of grout holes drilled into the rock foundation material or concrete at the direction of the contracting officer; Provided, That holes drilled for placing mortar or grout by the grouting method, as described in Paragraph 128 will not be measured for payment in the left diversion tunnel lining and in the inclined portions of the left and right spillway tunnel linings as provided in Paragraph 72.

Payment for drilling holes for setting foundation grout pipe or expansion-type plugs for grouting the rock surrounding the tunnels will be made at the unit price per linear foot bid in the schedule for drilling grout holes in stage between depths of 0 foot and 30 feet. Except as otherwise provided, payment for drilling grout holes will be made at the applicable unit price per linear foot bid in the schedule for drilling grout holes in stage between the depths specified in the schedule, which unit prices shall include the cost of furnishing all labor, materials, tools, and equipment required for drilling the holes; maintaining the holes free from obstructions until grouted; and all incidental work connected therewith.

75. Pipe for foundation grouting. Standard black metal pipe for grout connections shall be set in the concrete or foundation rock in the locations shown on the drawings and described in Paragraph 72. The contractor will have the option of setting regular pipe nipples for tunnel grout hole connections through the concrete lining and into the surrounding rock, if necessary, or of drilling through the concrete lining and using an expansion-type plug for such grout hole connections for pressure grouting the rock surrounding the tunnels and shaft as provided in Paragraph 77. Pipes for grouting shall also be set over springs, crevices in the rock, faults, or other foundation defects, wherever directed. Grout pipes set in concrete shall end not less than 3 inches inside of the finished surface of the concrete. A standard coupling and wrapped

nipple to facilitate removal after grouting shall be attached to the grout pipe and shall extend beyond the finished surface of the concrete as shown on the drawings. The holes left after removal of wrapped nipples shall be filled immediately and completely with drypack in accordance with the provisions of Paragraph 108.

The size of the grout pipe for each hole and the depth of the holes for setting pipe for foundation grouting shall be as shown on the drawings or as directed. The grout pipes shall be anchored into the rock or concrete into which they are inserted, and the spaces around the pipes shall be carefully sealed with oakum, grout, or other suitable material to prevent entry of concrete or other foreign materials prior to grouting. All oakum or other suitable material required for sealing shall be furnished by the contractor. All pipe and fittings to be embedded in rock or concrete shall be cleaned thoroughly of all dirt, grease, grout, and mortar immediately before being embedded in the concrete. The pipe and fittings shall be carefully assembled and placed and shall be held firmly in position and protected from damage until the concrete has set. Care shall be taken to avoid clogging or obstructing the pipes before being grouted, and any pipe that becomes clogged or obstructed from any cause, shall be completely cleaned out or replaced at the expense of and by the contractor.

All standard black pipe and fittings, all nails, tie wire, temporary supports, and other materials required for the work described in this paragraph shall be furnished by the contractor. The pipe shall be type I, class A standard black pipe in accordance with Federal Specification WW-P-406. The pipe fittings shall be malleable iron, type I, in accordance with Federal Specification WW-P-521b. The pipe shall be cut, threaded as necessary, fabricated as required, and placed by the contractor.

Payment for furnishing and placing metal pipe and fittings for foundation grouting and drainage will be made at the unit price per pound bid therefor

in the schedule, which unit price shall include the cost of furnishing, unloading, hauling, storing, handling, and supports and materials required for installation; of protecting the pipe from injury and clogging; and of removing the nipples in exposed faces and filling, with drypack, the holes left by the removal of the nipples. Payment will be made only for the metal pipe and fittings actually installed and left in place as directed by the contracting officer, and no additional allowance above the unit price bid in the schedule will be made on account of the varying size, length, or number of pipes required. No payment will be made for pipe and fittings used for placing mortar or grout by the grouting method in the left diversion tunnel lining or for the inclined portions of the left and right spillway tunnel linings as provided in Paragraph 72. Payment for drilling holes for setting foundation grout pipe and for expansion-type plugs for tunnel grouting will be made at the unit price per linear foot bid in the schedule for drilling grout holes in stage between depths of 0 foot and 30 feet, and only for those holes drilled and included for payment as provided in Paragraph 74.

76. Hook-ups to foundation and tunnel grout holes. Payment for hook-ups to foundation and tunnel grout holes will be made only once for each hole or connection actually hooked onto at the direction of the contracting officer, regardless of the additional number of times packer-settings are made or the same hole is hooked onto, and regardless of the volume of water or grout actually injected into the grout hole or connection. The number of separate grout holes or connections requiring hook-ups, as shown in the schedule, is only approximate and the contractor shall be entitled to no additional compensation above the unit price bid in the schedule by reason of the number of hook-ups actually required to complete the grouting operations as specified in Paragraph 77.

Payment for hook-ups to foundation and tunnel grout holes will be made at the unit price per hook-up bid therefor in the schedule.

Connections to cracks, crevices, or seams in the foundation, and connections to existing exploratory holes, when required, will be considered as grout holes and will be paid for as such under the unit price bid per hook-up in the schedule for hook-ups to foundation grout and tunnel holes. The item of the schedule for hook-ups to foundation and tunnel grout holes does not include the connections necessary for the grouting of contraction joints as specified in Paragraph 81; and does not include the connections necessary for placing mortar or grout by the grouting method as described in Paragraph 128 for those tunnels excavated by the contractor under these specifications.

77. Pressure grouting foundations and tunnels. Each drilled grout hole and grout connection for pressure grouting foundations and rock surrounding tunnels as described in Paragraph 72 shall have grout composed of cement and water forced into it under pressure.

The cement to be used for pressure grouting foundations and tunnels shall be furnished by the contractor in accordance with Paragraph 95. Pressures as high as practicable but which, as determined by trial, are safe against rock or concrete displacement shall be used in the grouting. The proportions of cement and water used in mixing the grout and admixtures where used, the time of grouting, the pressures used for grouting, and all other details of the grouting operations shall be as determined by the contracting officer.

Different grouting pressures will be required for grouting different sections of most of the grout holes. Where such grouting of a hole is directed by the contracting officer, the grouting shall be performed by attaching a packer to the end of a grout-supply pipe, lowering the grout-supply pipe into the hole to the top of the bottom section that is required to be grouted at a different pressure, grouting at the required pressure, allowing the packer to remain in place until there is no back pressure, withdrawing the grout-supply pipe to the top of the next higher section that is required to be grouted at a different pressure, and

thus successively grouting the hole in sections at the specified grouting pressures until the entire hole is completely grouted. The grout-supply pipes and packers shall be furnished by the contractor. The packers shall consist of pneumatic tubes or expansible rings of rubber, leather, or other suitable material attached to the end of the grout-supply pipe. The packers shall be designed so that they can be expanded to seal the drill holes at the specified elevations and, when expanded, shall be capable of withstanding, without leakage, for a period of 5 minutes, water pressure equal to the maximum grout pressures to be used. The amount of packer-grouting that will be required will depend upon the conditions disclosed by the drilling of the grout holes.

All intersected rock crevices, seams, or faults containing clay or other washable materials shall be completely washed with water and air under pressure to remove as much of such materials as possible. Such materials shall be ejected from one or more holes by introducing water under pressure in an adjacent hole. All grout holes shall be thoroughly tested with clean water under continuous pressure up to the required grouting pressure, as determined by the contracting officer, in order to effectively clean intersected cracks and seams and to determine rate of take, and extent of leakage.

The apparatus for mixing and placing grout shall be of a type approved by the contracting officer and shall be capable of effectively mixing and stirring the grout and forcing it into the holes or grout connections in a continuous, uninterrupted flow at any specified pressure up to a maximum of 500 pounds per square inch. The mixer shall be mechanically operated and provided with an accurate meter, reading in cubic feet to tenths of a cubic foot, for controlling the amount of mixing water used in the grout. In addition to the grout mixer, holdover mechanical agitator tanks shall be provided. All grout shall be pumped with a duplex piston-type pump or other type pumping equipment as approved. The grouting equipment shall be

satisfactorily maintained so as to insure continuous and efficient performance during any grouting operation. The arrangement of the grouting equipment shall be such as to provide a supply line and a return line from the grout pump to the grout hole. Provision shall be made to permit continuous circulation and accurate control of grouting pressures and grout flows into the grout holes.

Expansion-type plugs, if used for grout hole connections in tunnel grouting shall be furnished by the contractor. The plugs shall consist of expandable tubes or rings of rubber, leather, or other suitable material, and pipe and fittings. The plugs shall be designed so that they can be expanded to seal the drill holes and, when expanded, shall be capable of withstanding, without leakage, water pressure equal to the maximum grout pressure to be used. The cost of furnishing all necessary materials and labor for constructing and handling expansion-type plugs shall be included in the unit prices per sack bid in the schedule for pressure grouting foundations and tunnels.

If, during the grouting of any hole, grout is found to flow from adjacent grout holes or grout connections in sufficient quantity to interfere seriously with the grouting operation or to cause appreciable loss of grout such connections may be capped temporarily. When grouting is being done with packers, the pressure of the grout returning from any adjacent hole shall be measured by seating a packer in the adjacent hole, and such pressures shall be kept below the allowable pressures for that stage of that hole. Where such capping is not essential, ungrouted holes shall be left open to facilitate the escape of air and water as the grout is forced into other holes. Before the grout has set, the grout pump shall be connected to adjacent capped holes and to other holes from which grout flow was observed, and grouting of all holes shall be completed at the pressures specified for grouting. If, during the grouting of any hole, grout is found to flow from points in the foundations, abutment, or any parts of the structures,

Such flows or leaks shall be plugged or calked by the contractor as directed. The grouting of any hole shall be continued until the hole or grout connection takes grout at the rate of less than 1 cubic foot of the grout mixture in 20 minutes if pressures of 50 pounds per square inch or less are being used, in 15 minutes if pressures between 50 and 100 pounds per square inch are being used, in 10 minutes if pressures between 100 and 200 pounds per square inch are being used, and in 5 minutes if pressures in excess of 200 pounds per square inch are being used. So far as practicable, the full grouting pressure shall be maintained constantly during grout injections. However, as a safeguard against rock or concrete displacement or while grout leaks are being calked, the contracting officer may require the reduction of the pumping pressure, or the discontinuance of pumping. After the grouting of the holes or connections is completed, the pressures shall be maintained by means of stopcocks or other suitable valve devices, until the grout has set sufficiently so that it will be retained in the holes or connections being grouted.

No A-hole shall be grouted until all concrete required within a radius of 200 feet has been placed to a height of not less than 100 feet above the foundation rock or to its full height and has set a sufficient length of time, or until all contraction joints to be grouted under this contract within a radius of 200 feet have been grouted to a minimum height of 50 feet or to their full height, all as determined by the contracting officer. If, during the grouting of the A-holes, leakage develops into the cooling systems, the contraction joints, or the contraction-joint grouting systems, the affected joints and systems shall be flushed thoroughly with water and air alternately until the systems and joints are clean. The cost of washing the cooling systems and contraction joint systems in the above-described manner shall be included in the unit prices bid in the schedule for furnishing and installing metal tubing and fittings for grouting contraction joints and for furnishing and placing 1-inch outside-diameter metal pipe or tubing and



fittings for concrete cooling systems.

Measurement for payment for pressure grouting foundations and rock surrounding the tunnels and tunnel plugs will be made on the basis of the number of sacks of cement actually forced into the holes or grout connections at the direction of the contracting officer, or required to fill permanent pipes; Provided, That measurement for placing mortar or grout by the grouting method in the right diversion tunnel, outside the limits of the diversion tunnel plug, will be made of the number of sacks of cement and cubic feet of sand, measured separately, actually forced into the grout connections. One sack of cement will be considered as 94 pounds. Payment for pressure grouting foundations and tunnels will be made at the applicable unit price per sack bid therefor in the schedule, which unit price shall include the cost of furnishing admixtures where required, all labor, materials, tools and equipment required for the grouting, except that payment for furnishing and handling cement will be made at unit price bid in the schedule for furnishing and handling sacked cement for foundation grouting. Payment for hooking onto each grout hole or grout connection will be made as described in Paragraph 76. No payment will be made for grout or for cement used in grout lost due to improper anchorage of grout pipes or connections, or rejected on account of improper mixing, or lost by leakage due to the failure of the contractor to calk surface leaks when directed. All pressure grouting operations shall be performed in the presence of the contracting officer or his duly authorized representative.

78. Contraction joints in dam. Vertical contraction joints in the concrete of the dam will be provided for convenience in construction and to provide for contraction of the concrete. The details of these joints are shown on the drawings, and all contraction joints shall be constructed in accordance with the details shown, unless otherwise specifically directed in writing, by the contracting officer. Keys shall be built in the contraction



joints as shown on the drawings. The cost of constructing all contraction joints and keys between the blocks of the dam shall be included in the unit prices per cubic yard bid in the schedule for concrete in dam. Metal seals shall be placed in each contraction joint as shown on the drawings or as directed. The metal seals shall be furnished and installed by the contractor and payment therefor will be made in accordance with the provisions of Paragraph 148.

79. Tubing for grouting contraction joints. Systems of thin-wall steel tubing and fittings and grouting outlets shall be placed in the contraction joints in the dam, in the peripheries of the diversion tunnel plugs and backfill concrete, in contraction joints of diversion tunnel plugs and backfill concrete, in the contraction joint in the mass concrete beneath the machine shop, and elsewhere as shown on the drawings or directed. All tubing, fittings, and grouting outlets required shall be furnished by the contractor. All 1/2-inch risers and all 1 and 1/2-inch supply, header return, and vent lines shall be thin-wall electrical metallic tubing in accordance with Federal Specification WW-T-806b. Grout outlets shall be in accordance with Drawing No. 141(222-D-1185). Couplings for connecting together the lengths of plain-end electrical metallic tubing, and connectors used to join the plain-end electrical metallic tubing to standard pipe fittings shall be watertight fittings manufactured expressly for electrical metallic tubing. Tees used to connect the individual risers or grout outlets to the headers shall be galvanized and in accordance with Drawing No. 142(447-D-231). Standard pipe connections shall be galvanized standard weight fittings. Nipples shall be type A, wrought-iron or steel fitting in accordance with Federal Specification WW-N-351. Caps and couplings shall be type II, malleable-iron fittings in accordance with Federal Specification WW-P-521b. All nails, tie wire, wooden plugs, asphalt emulsion for sealing purposes, and temporary supports required for the installation of the grouting systems shall be furnished by the contractor. The asphalt emulsion

shall be in accordance with Bureau of Reclamation "Specifications for Plastic Compound (Paste-type Asphalt Emulsion)," dated February 15, 1948. All tubing shall be cut to length and formed by the contractor.

All tubing and fittings to be embedded in concrete shall be cleaned thoroughly of all dirt, grease, grout, and mortar immediately before being embedded in the concrete. The tubing and fittings shall be carefully assembled and placed and shall be held firmly in position while the concrete is being placed. Care shall be exercised to insure that the 2 companion members of each conduit-box-cover grouting outlet are maintained in accurate alinement and position with respect to each other that each member becomes an integral part of and moves with the concrete mass to which it is anchored. The method of attaching the first member of each grouting outlet to the forms and, in turn, the second member to the first is shown on the drawings. This method shall be adhered to accurately unless it is modified by specific instructions of the contracting officer.

Where grout tubing terminates at a concrete surface exposed to the action of flowing water, the tubing shall terminate in a recess constructed in the surface of the concrete. Where grout tubing terminates at other exposed concrete surfaces, the tubing shall be fitted with a wrapped nipple to facilitate removal as shown on the drawings.

Care shall be taken to insure that all parts of the system are maintained free from dirt and other foreign substances. After each 5-foot lift of the grouting systems is placed in position and before any concrete is placed around it, and at such other times as may be required, the tubing shall be tested by forcing air under pressure through it to determine that the system is completely free from obstructions after which it shall be immediately temporarily capped or otherwise closed to avoid the possibility of any foreign substance entering it until it is pressure grouted.

A continuous flow of water shall be circulated in the ungrouted supply headers of the contraction joint systems in the vicinity of the grouting of any A-hole. Should a contraction joint system become plugged as the result of the A-hole grouting, the contractor shall clean out the system before the grout has taken its initial set, by filling the system approximately half full of water through the supply header of the bedrock lift or the lift above, admitting air under pressure through its lowest return available, and opening and closing the air valves in such a manner as to produce water hammer in the system.

Any tubing that becomes clogged or obstructed before final acceptance of the work, due to any cause, shall, if practicable, be completely opened and cleaned. For any plugged tubing which the contractor fails to open or to replace, the contractor shall pay to the Government as fixed, agreed, and liquidated damages, the sum of two dollars (\$2) per linear foot of the total length of tubing which is thereby made ineffective, as determined by the testing. After the grouting operations have been completed, the contractor shall remove the grout nipples in the galleries and face of the structures, and all holes left after the removal of the nipples shall be filled immediately and completely with drypack in accordance with the provisions of Paragraph 108.

Payment for all work described in this paragraph will be made at the unit price per pound bid in the schedule for furnishing and installing metal tubing and fittings for grouting contraction joints, which unit price shall include the cost of unloading, hauling, storing, handling, and installing the tubing, fittings, and grouting outlets; of protecting the tubing from injury and clogging; and of removing the nipples in the galleries and face of the structures and filling, with drypack, the holes left by the removal of the nipples. Payment will be made only for the tubing and fittings, including grouting outlets, actually installed in the contraction joints and the computed weight for payment will not include the weight of nails, tie wire, wooden plugs, or temporary supports.



80. Hook-ups to contraction joint grouting systems. Each contraction joint in the dam is divided into a number of separate grouting systems from bedrock to the top of the dam, and each contraction joint grouting system contains its own seals, supply system, and venting system. Hook-ups to these contraction joint grouting systems in the dam and to contraction joint and periphery grouting systems in the tunnel plugs and backfill concrete of the diversion tunnels, and elsewhere as shown on the drawings or directed, will be required to wash out and test the contraction joints and grouting systems prior to grouting, to grout the various contraction joints and, if necessary, to rehook the systems during or after the grouting operations. Methods and procedures for hooking up to contraction joint grouting systems and for washing and testing the contraction joints shall conform to the applicable provisions of Paragraph 81.

Measurement for payment for hook-ups to contraction joints and periphery grout systems will be made of the number of supply lines hooked onto. Return lines, vent lines, and vent return lines hooked onto to complete the grouting of any grouting system will not be measured for payment. Payment for hook-ups to contraction joint grouting systems will be made at the unit price per hook-up bid therefor in the schedule, which unit price shall include the cost of furnishing all labor, materials, tools and equipment necessary to provide access to the joint headers; installing and removing temporary pipe lines to each grout header; hooking up for washing, testing, and grouting each complete contraction joint grouting system; and other incidental work to and during the grouting. Payment will be made only once for hooking up to each supply line of a contraction joint grouting system regardless of the number of times the same system or contraction joint may have to be hooked onto for washing, testing, grouting, or regrouting, or of the number of pipe connections required to insure a complete satisfactory grouting job for each contraction joint. The item of the schedule for hook-ups to contraction joint grouting systems does not include the hooking

up to cooling coils for grouting the cooling coils, and the cost of hooking up to cooling coils shall be included in the price bid in the schedule for pressure grouting contraction joints and cooling systems.

81. Pressure grouting contraction joints and cooling systems. When directed by the contracting officer, which in general will be as soon as possible after the concrete has cooled the desired amount, the contraction joints and embedded cooling coils in the dam and in the mass concrete below the machine shop shall be pressure grouted with cement grout. Grouting of the contraction joints in the dam up to elevation 3450 shall be performed before final closure of the diversion tunnels. Grouting of the transverse contraction joints 1-2, 2-3, 23-24, 24-25 will not be accomplished under this contract.

The contraction joints and the peripheries of the diversion tunnel plugs and backfill concrete shall be grouted in the sequence provided in Paragraph 52. The grouting systems for the tunnel plug periphery grouting shall be embedded in the lining of the diversion tunnels, and the grouting systems for the backfill concrete, including concrete placed in the excavation for drilling perimeter grout holes, shall be embedded in the backfill concrete with grout and vent outlets placed in holes drilled into the rock or concrete lining, all as shown on the drawings.

All grout for pressure grouting contraction joints shall consist of neat cement mixed with water. Cool water shall be used in the grout mixture to prevent quick setting of the grout, and water having temperatures above 70° F shall not be used. The cement to be used for pressure grouting shall be furnished by the contractor in accordance with Paragraph 95. All grout shall be mixed and pumped in accordance with the applicable provisions of Paragraph 77. The program of grouting, the time when each lift of a contraction joint shall be grouted, the grout mixture, the pressure applied,

and all other details of the grouting operations shall be in accordance with these specifications and as directed by the contracting officer.

The grouting of the contraction joints shall be done singly or in groups, as directed, and in separate successive lifts beginning at the foundation and finishing at the top of the dam. The grout feeder pipe shall extend close to the supply pipe for each lift of joint being grouted and shall have a connection with each supply pipe regulated by a valve. When more than one joint is being grouted at the same time, the grout shall be applied in rotation by batches or in such quantities as necessary to fill each joint at approximately the same rate and to complete the filling of all joint lifts at the same time. The grouting of each joint lift shall be completed before the grout takes its set in the grouting system but shall not be grouted so rapidly that the grout will not settle in the joint and in no case shall the time consumed in filling any lift of a joint be less than 2 hours.

The contractor shall provide all necessary facilities such as catwalks, ladders, and platforms to enable the engineers and inspectors to observe the grouting operations at each joint, and for quick and convenient passage from joint to joint as required. The contractor shall supply all labor, tools, and material required to assist in setting any dial gages or other devices used to indicate opening or closing of the joints during the grouting operation. The contractor shall provide a telephone communication and signal system for use during the washing, testing, and grouting operations. Before any lift of a joint is grouted, it shall be washed thoroughly with air and water under pressure and shall be allowed to remain filled with water for a period of 24 hours. Immediately prior to being grouted, the water shall be drained from the joint lifts to be grouted.

During the grouting operations, 2 or more joints, as determined by the contracting officer, of ungrouted joint lifts at the same level, shall be

filled with water to the level of the top of the lift being grouted. As the grouting of the lift of the joint nears completion, the grouting lift of the joint immediately above the lift being grouted shall be filled with water. Valves shall be used to control the flow of water into and from each joint. All accessible leaks discovered prior to grouting and all leaks occurring during the grouting operations shall be calked or otherwise stopped. Immediately after a grouting operation is completed, the water shall be drained from the joints in the lift above but shall not be drained from the adjacent ungrouted joint lifts at the same level until 6 hours after completion of the grouting operation. Joints, pipes, or formed drains into which grout has leaked shall be thoroughly washed out by alternately filling them with water and draining them until all grout has been removed, and all headers and outlets for each joint, pipe, or drain shall be tested and shall be clean before the joint, pipe, or drain shall be considered to be thoroughly washed out.

The grout shall be pumped into the supply header of the piping system for the lift. During the grouting of each lift of the joint the outlet ends of the vent pipes at the top of the lift shall have riser pipes about 5 feet in height and valves near the tops of the risers. The valves shall be left open until the lift is filled and only grout of proper consistency for retention in the joints remains in the risers, whereupon the valves shall be closed and the required pressure applied. The water and thin grout shall be bled from the top of the joint lifts and pressure shall be applied as many times as is determined by the contracting officer to be necessary to force all excess water from the grout. After the system ceases to take an appreciable amount of grout, the required final or residual pressure shall be maintained on the grout in the joint lift until the grout has taken its initial set. The simultaneous application of grout at 2 or more points in any one system shall be made if determined necessary from results of tests or previous groutings. After the cooling systems

have served their purpose, the pipes of the cooling systems embedded in the concrete of the dam, in concrete in diversion tunnel plugs and in backfill concrete in diversion tunnels shall be filled completely with grout. Immediately before the grouting is commenced, the water in the embedded cooling coils shall be completely blown out with air. The grout shall be held in the cooling coils until it has taken its initial set by means of valves on each end of the coils. Cooling coils in blocks 1, 2, 3, 23, 24, and 25 shall not be filled with grout as provided above. In these blocks, the water in the embedded cooling coils shall be completely blown out with air and the surface connections shall be capped.

Measurement for payment for pressure grouting contraction [sic] joints and cooling systems will be made on the basis of the number of sacks of cement actually forced into the contraction joints in the dam or required to fill permanent pipes. In measuring grout for payment, the volume of one sack of cement will be considered as 94 pounds. Payment for pressure grouting contraction joints and cooling systems will be made at the unit price per sack bid therefor in the schedule, which unit price shall include the cost of all labor, materials, plant, facilities, and operations required for the grouting; except that payment for furnishing and handling special cement for grouting contraction joints will be made at the unit price per barrel bid therefor in the schedule, and payment for hooking onto each contraction joint grouting system will be made as provided in Paragraph 80. No payment will be made for grout or for cement used in grout rejected by the contracting officer on account of improper mixing, or for grout lost by leakage due to failure of the contractor to calk leaks when directed. All pressure grouting operations shall be performed in the presence of the contracting officer or his duly authorized representative.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

<p>LAWRENCE H. RAY,</p> <p style="text-align: center;">Appellant</p> <p>vs.</p> <p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Appellee</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>NO. 20855</p>
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APPELLANT'S BRIEF

Upon Appeal from the District Court
of the United States
for the District of Arizona

JURISDICTIONAL FACTS

(1) Jurisdiction of the District Court:

18 U. S. C. A., §3231, provides that:

"The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

(2) Jurisdiction of this Court upon Appeal to review the

judgment:

28 U. S. C. A., §1291, reads:

"The Court of Appeals shall have jurisdiction of appeals from all final dispositions of the District Courts of the United States . . . except where a direct review may be had in Supreme Court."

28 U. S. C. A., §1294, reads in part:

"Appeals from the reviewable decisions of the District Courts shall be taken to the Court of Appeals as follows:

"1. From a District Court of the United States to the Court of Appeals for the Circuit embracing the District."

(3) Pleadings necessary to show the existence of jurisdiction:

- (a) The indictment in Case No. C-19396-Tucson;
- (b) The entry of verdict filed November 5, 1965;
- (c) The entry of judgment of guilty and sentencing on November 22, 1965;
- (d) Notice of Appeal.

STATEMENT OF THE FACTS

On September 15, 1965, in Cause No. C-19396-Tucson, by indictment in the United States District Court, Tucson, the defendant was charged with four counts of violation of Title 8 U. S. C. A. §1324 (a) (2) and with four counts of violation of Title

8 U. S. C. A. §1324 (a) (4). On November 3, 1965, the case came to trial on all eight counts.

At the close of defendant's case, defendant moved for a directed verdict of acquittal on three counts of transporting under Title 8 U. S. C. A. §1324 (a) (2) on the ground that the Government had shown no illegal entry. The evidence adduced at trial showed that all of the Mexican Nationals were in fact transported by the defendant in the United States, and further that the defendant promised them employment if they would come into the United States. The evidence further showed that three of the Mexican Nationals (Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez) had in their possession, at the time they crossed the border into the United States, valid border crossing cards issued under the provisions of 8 C. F. R. 212.6 (a). The evidence further showed that at the time the above named three Mexican Nationals entered the United States, they intended to stay longer than their crossing cards provided and that they intended to work while they were in the United States.

Over objection of counsel, the Court instructed the jury that:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States,

if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If a holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens."

(Transcript of Proceedings, Page 364, Line 14, through Page 365, Line 7).

Defendant's motion for a directed verdict of acquittal on Counts 1, 2 and 3 was denied. The jury deliberated and returned a verdict of guilty on all eight counts.

SPECIFICATIONS OF ERROR

1. The Court erred in not granting the defendant's motion for a directed verdict of acquittal on Counts 1, 2 and 3 at the close of the defendant's case.

2. The Court erred in instructing the jury:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If the holder of a Mexican non-

resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the point of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens.";

and the Court erred in refusing defendant's Requested Jury Instructions No. 3 and No. 4.

PROPOSITIONS OF LAW

1. Under Title 8 U. S. C. A. §1324 (a) (2), the Government must show that the entry of the aliens at the time of entry was illegal in order to sustain a conviction. Under Title 8 U. S. C. A. §1324 (a) (4), the Government must show that the entry at the time the person entered was illegal.

2. The plea of not guilty put into issue every allegation in each count and put upon the Government the burden of proving every essential element of the offense charged. Penal statutes must be strictly construed, and the defendant's acts must fall plainly within the class of acts denounced.

3. A legal entry into the United States, even though the

person is illegally staying in the United States at a subsequent time, will not sustain a conviction under Title 8 U. S. C. A. §1324 (a) (2) and (4).

ARGUMENT

AS TO SPECIFICATION OF ERROR NO. 1 AND PROPOSITIONS OF LAW NO. 1, NO. 2 and NO. 3:

Title 8, U. S. C. A. §1324 (a) (2) provides:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

* * *

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;"

An essential element of the offense is that the alien illegally entered the United States. The evidence shows that Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez had valid crossing cards. Chavez-Franco testified:

"Q Did you have what is called a Border crossing card?

"A That is all I had."

(Transcript of Proceedings, Page 25, Lines 7 and 8).

"Q When did you receive this Border crossing card, do

you remember?

"A I received it about the 29th of October, I believe.

"Q Of what year, sir?

"A In 1964."

(Transcript of Proceedings, Page 25, Lines 17 through 21).

Martinez-Dorame testified:

"A I told him I had no Immigration, that I only had a local crossing card."

(Transcript of Proceedings, Page 57, Lines 2 and 3).

"Q And what is that document, or what is that exhibit which purports to be a Border crossing card?

"A It is what we call a local passport.

"Q Was that the card to which you referred when you spoke to Mr. Ray in your home on the 8th of July?

"A Yes, it is a local card.

"Q Do you remember if you actually showed Mr. Ray this card?

"A No, I didn't show it to him."

(Transcript of Proceedings, Page 58, Lines 1 through 8).

Valenzuela-Lopez testified:

"Q What sort of papers, if any, did you have to come over into the United States?

"A Nothing but a local passport.

"Q Showing you Government's Exhibit 2 for identification, are you able to identify that document?

"A Yes, and this is my picture.

"Q Is that the passport you referred to, your local passport?

"A Yes, it is. It is just to come in."

(Transcript of Proceedings, Page 141, Lines 11 through 19).

The Code of Federal Regulations, Title 8, Chapter 1, Section 212.6 (a), provides:

" . . . A Mexican nonresident alien border crossing card, Form I-186, may be presented as an entry document at a United States port of entry on the Mexican border by a Mexican citizen who seeks to enter the United States for a period of 72 hours or less to visit in the area within 150 miles of the Mexican border. The rightful holder of a valid Form I-186 seeking entry into the United States from Mexico, or from Canada if he has been in no country other than the United States and Canada since leaving Mexico, may apply for admission at any United States port of entry for more than 72 hours or to proceed to areas in the United States outside the 150-mile geographical limitation, or both, and, if admitted, shall be issued a Form I-94."

Therefore, the three above mentioned aliens legally entered the United States. The fact that they did not leave the United States after the time they were permitted to stay had expired would not make their original entry illegal. This Court had occasion to pass upon the question of illegal entry under Title 8, U. S. C. A. §1324 (a) (2) in United States v. Orejel-Tejeda, 194 F. Supp. 140, 142:

"At the time of transportation all of the transported

aliens had been 'duly admitted to the United States by an immigration officer,' and were 'lawfully entitled to enter or reside within the United States' under the appropriate statutes, regulations and treaties. See Title V of the Agricultural Act of 1949, 7 U. S. C. A. §§1461-1468; 8 C. F. R. 214.2 (k). Such aliens had a non-immigration status (8 U. S. C. A. §1101 (a) (15) (H) (ii) and as such were subject to deportation for violations of the conditions of such status. (8 U. S. C. A. §1251 (a) (9)). It was only when the aliens were transported to the Turlock area, which was outside of their permitted area of labor, that they were subject to deportation, and, to that extent, illegally in the United States. It could be argued logically that at the time they were not 'lawfully entitled to reside within the United States' and that defendant, in changing their lawful status by the transportation, came within the proscription of Section 1324. Such an interpretation would be at variance with some cardinal principles of statutory interpretation."

The Court went on to say in its holding:

"This Court concludes that the history of this enactment establishes that Congress intended the phrase 'not entitled to * * * reside' to refer to the time the alien transported entered the United States. The congressional history is not crystal clear, but it is certainly persuasive; however, coupled with the usual rule that criminal statutes are to be strictly construed in favor of defendant, it supports the conclusion that Section 1324 (a) (2) of Title 8 U. S. C. A. does not proscribe the conduct of defendant herein."

In the above cited case, the defendant was indicted on eight counts of transporting alien farm laborers. These laborers were in the United States under valid farm labor permits under Title V of the Agricultural Act of 1949, U. S. C. A., §§1461-1468, but their permits allowed them to work only in the southern district of California and not in any other part of the United States.

The evidence showed that the defendant knew that the aliens were not allowed to work out of the southern district of California, and that he transported them to Turlock, California, for a profit; but as previously cited, the Court held that the entry into the United States was legal and even though the aliens remained illegally, the defendant could not be convicted under 8 U. S. C. A. §1324 (a) (2).

After discussing the legislative history of the above mentioned statute, the Court said:

"The report also states that the purpose of the legislation was 'to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally. In this context it would seem that 'remaining' refers to remaining in the country after illegal entry. A careful reading of the whole legislative history, while not conclusive, would seem to support this conclusion."

It is well established that a plea of not guilty puts the burden of proof upon the prosecution to prove all elements of the offense. In United States v. Waters, 73 F. Supp. 72, 73, it was said:

"The burden rests upon the prosecution to establish the guilt of each element of an offense."

In Prettyman v. United States, 180 Fed. 30, 42, it was said:

"The plea of not guilty put in issue every allegation in the count, and put upon the Government in its ablest way the burden of proving every essential element of the offense charged."

AS TO SPECIFICATION OF ERROR NO. 2 AND PROPOSITIONS OF LAW NO. 1,
NO. 2 AND NO. 3:

Title 8, U. S. C. A. §1324 (a) (2) and (4) provide:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

* * *

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;"

* * *

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of-

"any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, . . ."

Upon examination of the statute, it would appear that an essential requirement for conviction is that the alien illegally entered the United States. The words "not duly admitted by an immigration officer or not lawfully entitled to enter" would seem to support that conclusion, and therefore, Title 8 U. S. C. A. §1324 (a) (2) and (4), as interpreted by this Court in United States v. Orejel-Tejeda, 194 F. Supp. 140, would mean that if the aliens entered the United States legally, the defendant could not

be convicted of a violation of 8 U. S. C. A. §1324 (a) (2) and (4). The Court in that case said:

"This Court concludes that the history of this enactment establishes that Congress intended the phrase 'not entitled to * * * reside' to refer to the time the alien transported entered the United States. The congressional history is not crystal clear, but it is certainly persuasive; however, coupled with the usual rule that criminal statutes are to be strictly construed in favor of defendant, it supports the conclusion that Section 1324 (a) (2) of Title 8 U. S. C. A. does not proscribe the conduct of defendant herein."

The evidence shows that Carmen Chavez-Franco, Celedonio Martinez-Dorame and Antonio Valenzuela-Lopez had valid crossing cards. Chavez-Franco testified:

"Q Did you have what is called a Border crossing card?

"A That is all I had."

(Transcript of Proceedings, Page 25, Lines 7 and 8).

"Q When did you receive this Border crossing card, do you remember?

"A I received it about the 29th of October, I believe.

"Q Of what year, sir?

"A In 1964."

(Transcript of Proceedings, Page 25, Lines 17 through 21).

Martinez-Dorame testified:

"A I told him I had no Immigration, that I only had a

local crossing card."

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"Q And what is that document, or what is that exhibit which purports to be a Border crossing card?

"A It is what we call a local passport.

"Q Was that the card to which you referred when you spoke to Mr. Ray in your home on the 8th of July?

"A Yes, it is a local card.

"Q Do you remember if you actually showed Mr. Ray this card?

"A No, I didn't show it to him."

(Transcript of Proceedings, Page 58, Lines 1 through 8).

Valenzulea-Lopez testified:

"Q What sort of papers, if any, did you have to come over into the United States?

"A Nothing but a local passport.

"Q Showing you Government's Exhibit 2 for identification, are you able to identify that document?

"A Yes, and this is my picture.

"Q Is that the passport you referred to, your local passport?

"A Yes, it is. It is just to come in."

(Transcript of Proceedings, Page 141, Lines 11 through 19).

It is a well established rule of law that penal statutes should be strictly construed, and that the acts of the defendant

ust fall plainly within the class of acts denounced in the statute. United States v. Orejel-Tejeda, 194 F. Supp. 140, states:

"The first basic principle to be observed is that Section 1324 is a penal statute, and, therefore, is to be strictly construed."

Spector v. United States, 42 F. 2d 937, 941, states:

"A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by express terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expression or by the expunging of some of its words by the judiciary."

When the Court in this case instructed the jury that:

"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If a holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled

to enter or reside within the United States under the laws and regulations or the United States relating to the immigration and exclusion of aliens."

the Court was in a sense telling the jury that a person could be convicted under 8 U. S. C. A. §1324 (a) (2) and (4) if the entry was constructively illegal. Such a conclusion would be in variance with the statute which, as cited above, must be strictly construed. If what the Court instructed the jury was the law, then a defendant's conviction would depend on the secret intent of the alien. If, for instance, the alien at the time he crossed the border intended to stay in the United States, but the defendant was unaware of such intention, under the above instruction he could still be found guilty; but if the defendant intended at the time the aliens crossed that they stay and work for him for a period exceeding seventy-two hours, but the aliens had no intention of working at all or staying longer than seventy-two hours, then under the above instruction, their entry would be legal and the defendant could not be found guilty under the statute.

In construing the portion of the statute with reference to whether the alien was lawfully entitled to enter or reside in the United States, the Court in United States v. Orejel-Tejeda, 194 F. Supp. 140, said:

"At the time of transportation all of the transported aliens had been 'duly admitted to the United States by

an immigration officer,' and were 'lawfully entitled to enter or reside within the United States' under the appropriate statutes, regulations and treaties. See Title V of the Agricultural Act of 1949, 7 U. S. C. A. §§1461-1468; 8 C. F. R. 214.2 (k). Such aliens had a non-immigration status (8 U. S. C. A. §1101 (a) (15) (H) (ii) and as such were subject to deportation for violations of the conditions of such status. (8 U. S. C. A. §1251 (a) (9)). It was only when the aliens were transported to the Turlock area, which was outside of their permitted area of labor, that they were subject to deportation, and, to that extent, illegally in the United States. It could be argued logically that at the time they were not 'lawfully entitled to reside within the United States' and that defendant, in changing their lawful status by the transportation, came within the proscription of Section 1324. Such an interpretation would be at variance with some cardinal principles of statutory interpretation."

Although the Court had no occasion in this case to rule upon U. S. C. A. §1324 (a) (4), it would appear that the interpretation of illegal entry would have to be the same for (4) as it was for (2), and therefore the same rule would apply to one as well as the other.

It is well established that a plea of not guilty puts the burden of proof upon the prosecution to prove all elements of the offense. In United States v. Waters, 73 F. Supp. 72, 73, it was said:

"The burden rests upon the prosecution to establish the guilt of each element of an offense."

In Prettyman v. United States, 180 Fed. 30, 42, it was said:

"The plea of not guilty put in issue every allegation in the count, and put upon the Government in its ablest

way the burden of proving every essential element of the offense charged."

The defendant's Requested Jury Instructions No. 3 and No. 4 adequately stated the law with reference to the elements of the crime. Although it is felt by counsel for the defendant that the Court also adequately stated the law with reference to the elements of the crime, it is also felt that the Court's error was in its instruction as to what constitutes an illegal entry as hereinbefore quoted.

CONCLUSION

1. The defendant submits that because of the Court's failure to grant a directed verdict for the defendant on Counts 1, 2 and 3 on motion of counsel, the conviction should be reversed as to said counts.

2. Because the Court instructed the jury that:

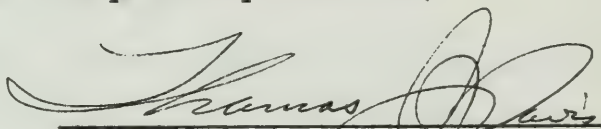
"The rightful holder of a Border crossing card may present the card in lieu of a visa to the Immigration officers at the port of entry when coming directly from Mexico. But the alien's entry into the United States, if permitted, is subject to and upon condition that his visit in the United States will not exceed in length seventy-two hours. If the holder of a Mexican non-resident alien Border crossing card, when he presents himself and his crossing card to the Immigration officers at the port of entry, actually has the purpose and intention, if permitted into the United States, to remain in the United States in excess of seventy-two hours and he obtains entry into the United States by means of the card, failing to disclose his purpose and intention to

the Immigration officers, then such alien upon entry into the United States is in the United States in violation of law and he is a person not lawfully entitled to enter or reside within the United States under the laws and regulations of the United States relating to the immigration and exclusion of aliens."

and refused the defendant's Requested Jury Instructions No. 3 and No. 4, the conviction on Counts 1, 2, 3, 4, 5, and 6 should be reversed and this Court should direct the trial court to enter a judgment of acquittal on said counts notwithstanding the verdict.

In view of the foregoing, defendant submits that the law requires a reversal of the trial court and a direction to enter judgment of not guilty on the grounds that the evidence does not support a conviction of the offenses charged.

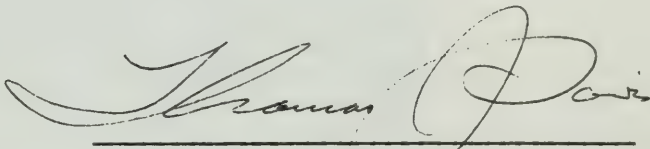
Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Thomas J. Davis', written over a horizontal line.

THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

CERTIFICATE AS TO RULES 18 AND 19

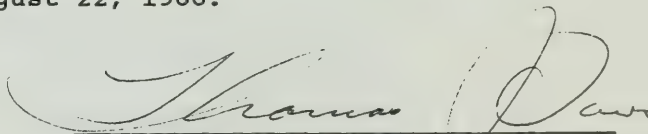
I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.



THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

PROOF OF SERVICE

I do hereby certify that I caused three copies of Appellant's Brief to be served upon the United States Attorney, Federal Building, Tucson, Arizona, on August 22, 1966.



THOMAS J. DAVIS
Attorney for Appellant
1008 Phoenix Title Building
Tucson, Arizona

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE H. RAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20855

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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For the District of Arizona

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FILED

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LAWRENCE H. RAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20855

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

This case was commenced by the return of an Indictment on September 15, 1965, by the Federal Grand Jury sitting in Tucson, Arizona. (Transcript of Record, Volume One, Item One. Hereinafter Volume One of the Transcript of the Record will be referred to as "RC"; the Transcript of the Testimony at the trial will be referred to as "TR"; the number following

will refer to the page number, and the number following "L" will refer to the line number).

The Indictment charged Appellant Ray with a violation of 8 U.S.C., §1324(a) (2), transporting aliens, in four counts, in that he did transport or move said four aliens in an automobile, within the State and District of Arizona, knowing that said aliens were in the United States of America in violation of law and knowing that their last entry into the United States of America occurred less than three years prior thereto; and with a violation of 8 U.S.C., §1324(a) (4), inducing aliens to enter, in four counts, in that he did wilfully and knowingly, at Agua Prieta, Sonora, Mexico, and at Douglas, State and District of Arizona, (three aliens), and at Naco, Sonora, Mexico, and at Don Luis, State and District of Arizona (one alien), encourage and induce the entry into the United States of America of the said four aliens, said aliens not then and there being lawfully entitled to enter and reside within the United States of America under the terms of the laws and regulations of the United States of America, said Appellant Ray then and there well knowing the foregoing. (RC Item 1.)

On September 28, 1965, Appellant Ray was arraigned and was present with his counsel, at which time he entered a plea of not guilty to each count of the Indictment. Trial was set for November 2, 1965. (RC Item 11).

The trial was not reached until November 3, 1965, and continued November 4 and 5, 1965, at which time the jury found Appellant Ray guilty as charged in all eight counts of the Indictment. (RC Item 11 & 3).

On November 22, 1965, the Court entered its judgment of guilty as to each count and sentenced Appellant Ray to eighteen months. (RC Item 5). The appellant posted bail on appeal in the amount of \$3000.00, and presently is at large. This is an appeal pursuant to 28 U.S.C., §1291.

II.

STATEMENT OF FACTS

The testimony offered by the Government at the trial consisted of the four aliens who are named in the Indictment, and in addition, Antonio Teddey, the brother-in-law of Carmen Chavez-Franco, one of the four named aliens, plus the two Border Patrol officers and a female alien.

Three of the aliens testified that the Appellant had come to the brother-in-law of one of them, Antonio Teddey, looking for workers. He was then introduced to the three aliens. One of the aliens informed him directly that he did not have papers and that he only had a border crossing card. The Appellant told each of the three aliens that where they were going to work there would be no danger from Immigration. (TR 24, L 21-22; TR 57, L 6-8; TR 140, L 21-24.) Appellant asked all four aliens to work for a month. (TR 29; 68; 143; 157.)

The fourth alien, who had no border crossing card, he told that there would be no danger of working there at the ranch (from Immigration). (TR 165, L 1-4.) All four aliens testified that they would not have entered if they had not been assured by Appellant that there was no danger. (TR 24; 57; 142; 165.)

On or about July 9, 1965, the Appellant picked up two of the aliens and drove them across the line into Douglas, Arizona, with the aliens using their border crossing cards in the presence of the Appellant (TR 27), to the home of a woman named Cruz and had them wait there while he went back and picked up the third alien, dropped him off just before the port of entry and picked him up again on the American side and drove to the house in Douglas and picked up the remaining aliens and drove them to northern Arizona to a place called Blue, Arizona. (TR 29-34; 59-63; 142-145.) They

worked there at Blue, Arizona, for a period of twenty-one days; they were then picked up by the Immigration officers. (TR 15; 63; 145.)

The fourth alien had just arrived from Naco, Sonora, Mexico, the day before the arrest. The Appellant had gone to him in Naco, Sonora, Mexico, and showed him where he could jump the fence and where he could be picked up by the Appellant on the American side, which was done. (TR 165-166.) This fourth alien, Jose Romero-Siquero, (named in Counts VII and VIII of the Indictment) testified also that he was driven north by Appellant with a female alien named Soledad Chavez (TR 167-168). Soledad Chavez testified to the same effect. (TR 185-186.)

The testimony offered by the Appellant consisted of two of his neighbors, one of whom testified that the Appellant was helping him to repair a truck on the date of the unlawful importation of three of the aliens. (TR 215-266.)

The Appellant himself took the stand, denied that he had driven the aliens to Blue, Arizona, but had merely found them in Blue, Arizona, and had employed them. (TR 285-288.) Appellant also testified that Soledad Chavez was a friend of his wife whom he had driven up to Northern Arizona, and denied picking up Jose Romero-Siquero. (TR 294-295.) He also denied going to the home of Celedino Martinez-Dorame in Agua Prieta, Sonora, Mexico, in October 1965 and asking him to sign a letter disavowing his testimony and that he, the Appellant, would help Celedino if he did so. (TR 325; see also 333-335.)

III.

OPPOSITION SPECIFICATION OF ERRORS RELIED ON

1. The Court did not err in refusing to grant Appellant's Motion for Judgment of Acquittal on Counts I, II and III at the close of Appellant's case.

2. The charge as quoted on pages 4 and 5 of Appellant's Opening Brief is a correct statement of law.

IV.

SUMMARY OF ARGUMENT

1. It is the intent of the alien at the time of entry that fixes the entry as lawful or unlawful.

2. The Court properly charged the jury when, in giving the elements of the offense of inducing, charged that one of the elements was that the Appellant knew the alien was not lawfully entitled to enter or reside within the United States.

V.

ARGUMENT

1. It is the intent of the alien at the time of entry that fixes the entry as lawful or unlawful.

Appellant argues that the entry of the three aliens with the use of the Border Crossing Cards, when they intended to remain in the United States one month to work, was a lawful entry.

8 CFR, §212.6(a), provides:

"A Mexican nonresident alien border crossing card on Form I-186 may be presented as the sole entry

document by a Mexican citizen at a Mexican border port. A Canadian nonresident alien border crossing card on Form I-185 may be presented by a Canadian citizen or British subject residing in Canada to facilitate entry at a United States port. When presented by the rightful holder, Form I-185 and Form I-186 are valid for admission to the United States in accordance with the terms noted thereon."

The terms as noted on the Form I-186 (see Government's Exhibits 1, 2 and 3 in evidence) are that the alien may remain in the United States not more than seventy-two hours and/or may not work in the United States.

As was stated by this Court in *Del Castillo v. Carr*, (9th Cir., 1938), 100 F.2d 338, at p. 341, it is the intent of the alien that fixes the entry as lawful or unlawful. See also *Sledens v. Shaughnessy*, (2d Cir., 1949), 177 F.2d 363, at p. 364; *United States v. Shaughnessy*, (2nd Cir., 1955), 221 F.2d 262, at p. 264; *Brownell v. Carija*, (D.C. Cir., 1957), 254 F.2d 78.

In *United States v. Orejel-Tejeda*, 194 F.Supp. 140 (1961), cited by Appellant, the entry of the aliens was clearly legal. They had been brought in under valid farm permits. However, in the instant case, the Government's proof was that the intent of the aliens, when they entered, was to remain in the United States to work for one month, and the Appellant knew this and had induced them to enter for that purpose.

It is respectfully submitted the Court did not err in denying the Motion for Directed Verdict of Acquittal on Counts I, II and III, (which, of course, was treated as a Motion for Judgment of Acquittal pursuant to Rule 29(a), Title 18 U.S.C.A., Federal Rules of Criminal Procedure).

2. The Court properly charged the jury when, in giving the elements of the offense of inducing, charged that one of the elements was that the appellant knew the alien was not lawfully entitled to enter or reside within the United States.

The Court, in charging the jury, defined what constitutes an unlawful entry as is quoted on pages 4 and 5 of Appellant's Opening Brief, but went on in its charge to list the elements of offense as follows:

"Before you may return a verdict of guilty as to the defendant on any of Counts 1, 2, 3 or 7—those are the counts that charge the encouragement and inducing of the aliens to enter the United States—the Government must have established as to the count under consideration, to your satisfaction, from the evidence beyond a reasonable doubt, the following essential elements of the charge made in the count under consideration. First, that on or about the date set out in the count under consideration, the person described in the count under consideration as an alien was in fact an alien. Second, that on or about that date the alien was not lawfully entitled to enter or reside within the United States of America under the terms of the laws and regulations of the United States relating to the immigration or exclusion of aliens. Third, that on or about such date and at the place or places named in the count under consideration, the defendant, knowing that the alien was not lawfully entitled to enter or reside within the United States, wilfully and knowingly encouraged and induced the entry of the alien into the United States. If you find as to any of Counts 1, 2, or 3 or 7, or as to all such counts that the Government has proved each of these essential elements beyond a reasonable doubt, then you may find the defendant guilty as charged in

such count or counts. However, if you find as to any of Counts 1 or 2 or 3 or 7 or all of such counts that the Government has failed to prove by evidence satisfying you beyond a reasonable doubt any of such essential elements, then you will find the defendant not guilty on such count or counts." (TR 365, L 8 — TR 366, L 10.)

Further, in charging the elements of transporting, the Court gave the elements as follows:

" . . . Before you may return a verdict of guilty as to the defendant on any of the transportation counts, that is, on any of the Counts 4, 5, 6, or 8, the Government must have established as to the Count under consideration to your satisfaction, from the evidence, beyond a reasonable doubt, the following essential elements of the charge made by the count you have under consideration. First, on or about the date charged in the count under consideration, the person described in such count as an alien, in the United States in violation of law, that the person described under consideration as an alien, was in the United States in violation of law and had last entered the United States within three years prior to such date. Second, that on or about the date charged in the count under consideration, the defendant transported or moved such alien in an automobile between the points in the State of Arizona described in such count. Third, when the defendant transported and moved the alien, he knew that the alien was in the United States in violation of law and he knew that the alien's last entry into the United States occurred less than three years prior to such transportation. And, fourth, that the transportation of such aliens by the defendant was done in furtherance of the alien's violation

of the law, that is, for the purpose of aiding or assisting the alien to remain or continue to stay in the United States in violation of law. If you find as to any of the transportation counts, that is, as to Count 4 or 5 or 6 or 8, or as to all of such counts, that the Government has proved each of these essential elements beyond a reasonable doubt, then you may find the defendant guilty as charged in such count or counts. If, however, you find as to any of these counts or as to all of them that the Government has failed to prove by evidence satisfying you beyond a reasonable doubt any of such essential elements, then you must find the defendant not guilty on such count or counts." (TR 368, L 12 — TR 369, L 21.)

Appellant is not arguing there was not sufficient evidence to return the verdict, but that the essential elements of the offense were not given in the charge. The Appellant's contention is that an entry by an alien with Form I-186, Border Crossing Card, who intends when he enters to remain in the United States longer than seventy-two hours, or who intends when he enters to work in the United States, is still a lawful entry.

8 U.S.C., §1325, provides:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) *obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact*, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished . . ." (Emphasis added)

The Statute for illegal entry as above quoted defines an entry obtained by the willful concealment of the material fact,

in this case, to-wit: that the alien seeking entry intended to remain in the United States longer than seventy-two hours and, in addition, was intending to work. The entry therefore, as defined by the Court in this charge, and as quoted in Appellant's Opening Brief at pages 4 and 5, is an unlawful entry.

VI. CONCLUSION

It is respectfully submitted that the elements of the offense as charged by the Court are a correct statement of the law and that there was sufficient evidence upon which to return a verdict of guilty on all eight counts.

Respectfully submitted,

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United States Attorney

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Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this
...20... day of September, 1966, to:

THOMAS J. DAVIS
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Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE H. RAY,)
)
Appellant,) NO. 20855
)
vs.) PETITION FOR REHEARING
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)

COMES NOW the appellant, by and through his attorney, Thomas J. Davis, and respectfully petitions the Court for rehearing in the above entitled matter, on the grounds and for the reasons that this Court's opinion in the above appeal, at the bottom of Page 3 and at the top of Page 4 reads,

"The transcript of the proceedings at the time the general sentence was imposed reveals clearly that the District Judge felt that the proper punishment to be inflicted upon the appellant for all offenses of which he was convicted was incarceration for eighteen months."

It is apparent from this language that this Court is of the opinion that the Judge, in making a determination of what sentence was proper under the circumstances, considered the fact that the jury had convicted on eight counts. If, in fact, the jury had only convicted on two counts, the sentence obviously might have been less than eighteen months, although it could have been more than eighteen months.

For these reasons, it is apparent that this Court must consider whether the convictions on Counts 1 through 6 were proper.

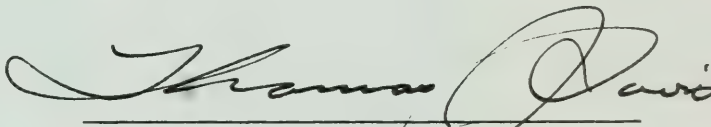
Respectfully submitted,



THOMAS J. DAVIS
Attorney for Appellant
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CERTIFICATE

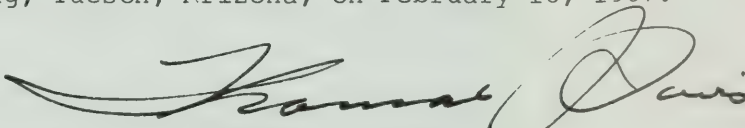
I, Thomas J. Davis, hereby certify that in my judgment, this petition is well founded and is not interposed for the purpose of delay.



THOMAS J. DAVIS
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PROOF OF SERVICE

I, Thomas J. Davis, do hereby certify that I caused three copies of this Petition to be served upon the United States Attorney, Federal Building, Tucson, Arizona, on February 16, 1967.



THOMAS J. DAVIS
Attorney for Appellant
1008 Transamerica Building
Tucson, Arizona 85701

No. 20,873 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED FRUIT COMPANY,

Appellant,

VS.

MARINE TERMINALS CORPORATION,

Appellee.

BRIEF FOR APPELLANT

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No. 20,873

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED FRUIT COMPANY,

Appellant,

vs.

MARINE TERMINALS CORPORATION,

Appellee.

BRIEF FOR APPELLANT

JURISDICTION

Jurisdiction of this Court exists by virtue of 28 U.S.C. §1291 and a Notice of Appeal (R. 1, p. 98)* filed on December 7, 1965, from Findings of Fact, Conclusions of Law, and Judgment (R. 1, p. 94) entered in the United States District Court for the Northern District of California, on November 10, 1965.

The District Court had jurisdiction under 28 U.S.C. §1332 by virtue of a Third-party Complaint between parties of diverse citizenship.

*The record in this case consists of seven volumes, not consecutively paginated. The references to both the pleadings and the oral evidence, therefore, are by volume number and page number, as "R. 2, p. 75". Exhibits are referred to as "Ex. 1", using the same designation as used in the trial court.

STATEMENT OF THE CASE

This is a shipowner's appeal from a Judgment (R. 1, p. 94) denying the shipowner's Third-party Complaint for maritime indemnity from its contract stevedore. The indemnity suit arose from an earlier Judgment for personal injuries (R. 1, p. 95) entered in favor of the contract stevedore's employee, longshoreman Navarro, against the shipowner. Although Navarro originally sued the vessel owner both upon negligence and unseaworthiness, Navarro voluntarily dismissed the negligence claim before his case against the vessel was submitted to the jury (R. 1, p. 95), and his recovery against the vessel was premised solely upon unseaworthiness. The indemnity claim was tried to the Court without a jury, using the evidence at the Navarro trial and additional evidence introduced at later hearings (R. 1, p. 95).

Most of the critical facts are not disputed. The Court's Findings, however, are not sufficiently detailed for a comprehensive understanding of the event. Therefore it is necessary to state the facts in some detail.

Navarro and approximately thirty-four other longshoremen (R. 5, p. 30) at 8:00 a.m. on June 4, 1960 (R. 2, pp. 3-5) were assigned by their employer, Marine Terminals (Appellee), to discharge banana stalks from four decks of the No. 1 hold of Appellant's SS LIMON (R. 5, p. 29). About three hours later, while in the vessel, Navarro was hit on the head by a falling bin board (R. 1, p. 95).

A brief explanation of the vessel's structure and the area is required. (Photographs taken by Appellant a year after the accident were introduced into evidence by the Plaintiff, as Ex. 1-A through 1-I). Immediately forward

of the No. 1 cargo hatch square is a much smaller hatch, known variously as an "escape hatch", "escape trunkway", or "access trunkway" (R. 6, p. 22; Ex's 1-A to 1-I). The access trunkway is simply an empty open space, roughly 36" square, extending vertically from the weather deck down, through all deck levels, to the bottom of the ship, and containing a vertical ladder to be used for access to the cargo holds. The cargo is kept from falling into this space by solid bulkheads on the forward and after limits and, on the two sides, by a system of horizontal demountable boards which can be placed in position to produce a structure much like a slatted fence. These demountable side boards are known as bin boards. (See Ex. A, Ship Blueprint; Ex. B, Access Hatch Plan; and photographs, Ex's 1-A through 1-I).

The No. 1 hold at all deck levels was completely filled with a cargo of stalks of bananas when the vessel came into San Francisco (Ex. C, Hold Loading Plan). It was the invariable custom of the vessel to have all of the bin boards in their proper places in the slots along the sides of the access trunkways when there was a full cargo (R. 7, pp. 107-108, 161-163); otherwise the bananas would fall into the access trunkway during the passage at sea, making it impossible for anyone to go into the trunkway.

It was necessary for some of the vessel's crew to enter the access trunkway during the voyage at sea to check the temperature of the bananas, which had to be refrigerated and maintained at a constant temperature, and, in fact, the Captain, Chief Mate and Chief Engineer did, one day before the accident, enter the No. 1 access trunkway and check the temperature of the bananas (R. 6, p. 28; R.

7, pp. 99-105, pp. 159-161). On that occasion all of the bin boards were in their proper places along the sides of the access trunkway (R. 7, pp. 99-105). No one from the vessel thereafter went into the access trunkway (R. 7, pp. 122-125).

On the inside of the after bulkhead of the access trunkway is a small rack into which the bin boards can be placed when they are taken out of their side slots (Ex. 1-I). Longshoremen took the boards (R. 4, p. 22) and sometimes placed them in the storage rack, and sometimes threw the boards to one side in the hold of the vessel (R. 5, p. 27; R. 7, pp. 135, 136).

This vessel is one of seven similarly designed and constructed vessels (R. 6, p. 23). None of these vessels had an access trunkway when they were originally built (R. 7, p. 30). As the direct result of requests by the Longshoremen's union on the West Coast of the United States, the United Fruit Company, in the early 1950's, altered all of these ships by adding the access trunkway (R. 7, pp. 31-34). This trunkway was therefore specifically designed and constructed for the use of longshoremen, considering the reasons for the request, and the applicable safety standards (R. 7, pp. 34-45).

The vessel arrived at San Francisco in the early morning hours of June 4, 1960 and tied up at the pier (R. 7, p. 99). The vessel's carpenter loosened the bolts which clamped the access trunkway lid on the weather deck, thereby unsecuring the access trunkway lid, but, no one from the crew had any reason to go down into the access trunkway (R. 7, pp. 122-127), and there is no evidence that anyone from the crew of the vessel ever did, in fact,

go into the access trunkway on this or other occasions under these circumstances.

Shortly after 8:00 a.m. a few of the 34 longshoremen at the No. 1 hatch began the discharging operation by entering through the cargo hatch square into the uppermost deck (bridge 'tween deck). They discharged a few stalks of bananas by placing them into a large vertical shore-based conveyor known as a gantry crane. When sufficient working space had been created (a few minutes), the deck was opened in the hatch square and the conveyor was extended into the next lower deck. This process continued for between 30 minutes to an hour, by which time (9:00 a.m.) all four deck levels of the No. 1 hold had been opened, and discharging into the conveyor went on more or less continuously from four decks simultaneously (R. 4, pp. 23-25).

As the longshoremen entered each deck level through the cargo hatch square, they immediately cleared away the bananas from the offshore (starboard) side of the access trunkway (R. 4, p. 25) so that the access trunkway bin boards could be taken down and the longshoremen could use the access trunkway ladder, which was their only means of entry or exit as long as the gantry crane was in the cargo hatch square.

The stevedoring contractor was not only in control in fact, but also in control, as a matter of law, because of a specific agreement entered into between the stevedore and the vessel (R. 1, pp. 12, 13, 17):

“It is agreed between the parties that the stevedore shall be in full control of those parts of the vessel and adjoining land structures and areas in which it

is conducting stevedoring operations, and shall be responsible for all personal injuries * * * without exception * * * if caused in whole or in part by the negligence, whether active or passive, of the stevedore, and the stevedore does hereby indemnify and hold harmless the company * * *".

Shortly after 11:00 a.m., about three hours after the stevedore entered into control of the vessel for stevedoring purposes and after approximately three hours of having thirty-four of its employees in and about the No. 1 hold, Navarro sustained injuries as he stood at the base of the access trunkway ladder in No. 1 lower hold. At that time a bin board slipped from a precarious position on the bin board rack at the bridge 'tween deck level (the highest deck level), probably from on top of the forward lip of the rack, and fell through four deck levels and struck Navarro (R. 1, p. 95). The bin board obviously should have been fully in the rack, behind the lip, and not on the lip, or in any other precarious position.

The particular bin board was in place in its side slots when the ship came into San Francisco (R. 7, pp. 99-105). The longshoremen immediately discharged the cargo between the hatch square and the side of the access trunkway, so they could remove the access bin boards and use their specially designed and constructed access trunkway (R. 4, p. 25), which was their *only* means of ingress and egress.

The only eyewitness was another longshoreman named Teixeira. He was standing on the weather deck, and had been looking directly down the access trunkway for about thirty seconds (R. 2, p. 33). He saw the board slipping

past the lip of the rack and falling downward (R. 2, p. 34-35). He said the board appeared to come off the lip (R. 2, p. 34-35). He looked at the rack after the accident and found a couple of boards still in the rack, but they were *in* the rack and “None of them were exposed to any danger . . .” (R. 2, p. 22). (The bin board rack has a base and a lip $\frac{7}{8}$ ” high on the front of the base, and a horizontal strap approximately two-thirds of the way up, which combine, along with the side and center rack supports, to hold the bin boards safely in place when the bin boards are placed fully in the rack [Ex’s B & 19; see R. 7, p. 54]).

There was no evidence that any United Fruit Company employees were anywhere near the site of the accident at the time it occurred. There was no evidence that United Fruit Company employees *ever* touched bin boards during stevedore operations. There was no evidence of any mechanical defect in the board or the rack which would have caused a board, properly placed in the rack, to jump out of the rack and the Court held that the exact cause of the board’s falling had not been shown (R. 1, p. 97), although it fell “without any intervening force” having caused the fall (R. 1, p. 95).

The Court held that “the shipowner has failed to show that the third party defendant, through any of its agents, placed the bin board in the rack” (R. 1, p. 96), although the Court agreed that the bin board had been placed in a precarious position by someone (R. 1, p. 97).

The Court held that it was the burden of the shipowner to prove that a longshoreman had misplaced the bin board in its precarious position, and that this fact had not been

proven, and gave no effect to the unquestioned contract provision that the stevedore should be in full control.

Appellant asserts that, on the facts found by the Court, the control provision of the contract requires that judgment be entered for Appellant.

In addition, Appellant asserts that the Court was clearly in error in finding that Appellant had failed to prove that a longshoreman had misplaced the bin board in a precarious position.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to give effect to the written agreement of the stevedore that it was "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations".

2. The District Court erred in failing to grant indemnity where the stevedore warranted a safe, proper and workmanlike performance and also, in addition, undertook specifically to indemnify the vessel for any stevedore fault, regardless of degree and without consideration of vessel conduct, and also agreed that it was in full control of those parts of the vessel and areas where it was conducting stevedoring operations, and an accident occurred in such an area three hours after the stevedore began operations as a result of a bin board's dropping from an improper and precarious position.

3. The District Court erred in requiring that the vessel prove that a specific longshoreman mishandled the bin board, under the circumstances of this accident.

4. The District Court erred in finding that Appellant has failed to prove that it was a longshoreman who misplaced the bin board.

SUMMARY OF ARGUMENT

In the Maritime Law, as elsewhere, the normal legal responsibility for events can be shifted by the parties by agreement. For this purpose the device of specifying which party shall be deemed to be the owner or employer or in control is familiar and valid and is normally given full legal effect.

The written contract by which the stevedore agreed that it was "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations" carries with it the obvious legal consequence of control, which is legal responsibility for injury to a longshoreman within the time and area of the stevedore's control unless the stevedore proves that it is not responsible for the accident. The Court below held that there had been insufficient proof to establish the exact identity of the person who had placed the bin board in its precarious position, but since the accident occurred three hours after the beginning of the contractual assumption of control by the stevedore, the contract requires that, as between the stevedore and the vessel, the stevedore be responsible for the accident since it was in full control and has failed to make any showing that it was not responsible or that the vessel was.

As an independent point, Appellant asserts that the District Court's finding that the shipowner failed to carry

the burden of proof is clearly erroneous. The only evidence concerning the position of the bin board before the vessel was turned over to the stevedore was that the bin board was in its proper position in the side slot of the access trunkway holding out the bananas. The evidence indicates that only longshoremen handled the access trunkway bin boards while the vessel was in San Francisco. Since the Court found that someone had placed the bin board in a precarious position and that, without explanation, it subsequently fell and struck Navarro, casting the vessel into liability for unseaworthiness without fault on its part, the District Court's finding that the shipowner had failed to prove that it was a longshoreman who had placed the bin board in its precarious position is clearly erroneous and should be reversed.

ARGUMENT

- I. **THE COURT BELOW WAS WRONG IN REFUSING TO GIVE EFFECT TO THE VALID CONTRACT PROVISION SHIFTING TO THE STEVEDORE THE RISKS AND LIABILITIES OF CONTROL.**
- A. **Contracts or statutes which define legal responsibility by the device of providing that one of the parties shall be deemed to be in ownership, employment or control are well known, valid and enforceable.**

The shipowner and stevedore here did not leave the question of control, in the context of injury and damage, to be resolved in each instance by an extensive proof of facts involving considerable areas and the activities of dozens of men. Instead, in providing for their relative responsibilities for injury and damage, they declared

explicitly that one party, the stevedore, was the party in control of the areas involved.

Clearly there was a good and legitimate business reason for doing this. The control provision is obviously designed to resolve, as between the shipowner and the stevedore, the question of who is in control for legal purposes, without the expense attendant to leaving the matter open to argument in each case. The expense of the alternative is, in large part, a cost in safety itself, since control carries with it responsibility and the provision for control by the stevedore places responsibility for safety in the hands of the party best able to carry it out.

There is nothing unusual or of doubtful validity about this device of fixing responsibility by declaring that one party or another is deemed to be in ownership, employment or control. The device is used both in contracts and in statutes and is given full effect by the law.

For example, when a master of a tug which is hired by a vessel acts as a docking pilot for the vessel, it is proper for the parties to agree by contract that the tug master shall be considered to be the employee of the vessel, solely so as to prevent the vessel from recovering from the tug company for any damage caused by the tug master's negligence. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 1933 A.M.C. 35 (1932).

Likewise, by statute Congress has provided that a bareboat charterer of a vessel "shall be deemed the owner of such vessel" 46 U.S.C. §186. The purpose was explained in Congress to be that the charterer should be burdened with, and the owner relieved from, the responsibility for

debts and liabilities which would otherwise fall upon the owner (23 Cong. Globe 715) and the provision is given effect accordingly. See *Thorp v. Hammond*, 79 U.S. (12 Wall.) 419 (1871).

There is no reason why the control provision of the contract here is not valid and enforceable and none was assigned by the Court below.

B. The Court below either refused or neglected to apply the control provision of the contract, by which the shipowner and the stevedore attempted to resolve between themselves which party was to be deemed "in full control" of the area and should bear the legal consequences which follow from control.

In order to appreciate the effect of the contract, a short review of the major facts leading up to the Court's decision is appropriate. The bin boards were erected in South America and the bananas were stowed against the bin boards (R. 7, pp. 138, 139). The bin boards had to be in place or the bananas would have fallen down into the access hatch, not only generally, but on this particular voyage (R. 7, pp. 138, 139). The vessel was turned over to the stevedore without anyone from the crew having gone in after the captain's inspection (R. 7, pp. 122-125). Three hours later a bin board fell from a precarious position on a rack, striking Navarro (R. 1, p. 95). There has never been any explanation as to exactly why or how the bin board slipped off the rack (R. 1, p. 97), although to the only eyewitness it apparently slipped off the lip of the rack (R. 2, pp. 34, 35). The Court found that the ship failed to prove that it was a longshoreman who had placed the bin board in its precarious position, from

which it subsequently, without any intervening force or other explanation, fell onto Navarro (R. 1, pp. 96, 97).

The contract by which the stevedore was "in full control" read as follows, in pertinent part:

"It is agreed between the parties that the stevedore shall be in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations, and shall be responsible for all personal injuries, including death * * * without exception * * * if caused in whole or in part by the negligence, whether active or passive, of the stevedore, and the stevedore does hereby indemnify and hold harmless the company * * *".

The interpretation of this contract is simple. The parties to the contract were a shipping company and a stevedoring contractor. The subject of the contract was the question of control and consequent responsibility for injuries and deaths occurring to *anyone* while the stevedore was conducting its operations, and the contract provided for indemnity. The agreement was intended to be much stronger, from the standpoint of the shipowner, than the ordinary maritime law of indemnity, not only because of the control provision but because the stevedore agreed affirmatively to indemnify the vessel where the stevedore was at fault in any degree, and thus without regard to any defense which it might otherwise have against the shipowner based on possible negligent conduct of the latter.

Certainly the industry and the circumstances of the parties are of great importance. Both the stevedore and the shipowner are experienced in the business of stevedor-

ing and shipping. All knew that 35 or so longshoremen would usually be working at each of several holds of the vessel. There were only two United Fruit Company employees (Mr. Wilde and Mr. Lewis) who had anything to do with the stevedoring operation on the ship and their visits were limited to occasional visits to the hold, perhaps once or twice during the course of a day (R. 5, pp. 16-19, 49, 50). As this Court knows, accidents occur frequently in the stevedoring business, resulting in injuries to longshoremen. Longshoremen and the stevedoring companies do not always report accidents to the vessel and its representatives, as in this case where the ship sailed without any notice that the accident had occurred. As the Court also knows well, lawsuits against shipowners frequently result from injuries to longshoremen and recovery can be had by the longshoreman, without any fault on the part of the shipowner, because of a transitory condition of unseaworthiness which can neither be confirmed nor disputed except by appraisal of the testimony of the longshoremen involved, as this case again illustrates.

The express contract obligation is, of course, in addition to the implied warranty under the general Maritime Law because there is no expression of intent in the written contract to exclude the warranty imposed by law. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 336 F.2d 124, 1964 A.M.C. 1927 (9th Cir.). The law of indemnity, from *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 1956 A.M.C. 9 onward, has been increasingly liberal in granting indemnity. In *Crumady v. The Joachim Hendrik*

Fisser, 358 U.S. 423, 1959 A.M.C. 580, a vessel was allowed indemnity even though its safety devices were improperly set. In *De Gioia v. United States Lines Company*, 304 F.2d 421, 1962 A.M.C. 1747 (2nd Cir.), the vessel was allowed indemnity although the vessel's deck was covered with trash even before the stevedore began work. The imposition of liability upon the stevedore in these cases falls within the policy stated by the Supreme Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 324, 1964 A.M.C. 1075, 1082, that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

Three hours after the stevedoring contractor assumed "full control" of the areas of the vessel and the land and other structures where it was conducting its operation, an accident occurred. Clearly some man misplaced that bin board in a precarious position to cause it subsequently to fall without any intervening force. The stevedore and its employees were using an access hatchway which was specially constructed for the use of stevedores and their employees, the longshoremen. There is no evidence that there was anyone from the United Fruit Company in the vicinity of the accident at any critical time.

Even assuming that the Court is correct that it is not proven that it was a longshoreman who misplaced the bin board in its precarious position, the application of the contract requires that the shipowner be given indemnity against the stevedore. The vessel was held for breach of warranty of seaworthiness, without any fault on its part. Since the Court below was not satisfied that there was

any proof as to the identity of the person who misplaced the bin board in the precarious position from which it subsequently fell and since the stevedore was in "full control" of the area of the vessel when the accident occurred, it is the stevedore which must bear the responsibility for the accident. In denying indemnity the Court below failed completely to give effect to the contract provision for control and did so without so much as suggesting a reason for its invalidity.

II. EVEN APART FROM ITS FAILURE TO GIVE EFFECT TO THE CONTRACT, THE DISTRICT COURT'S DECISION THAT THE VESSEL OWNER HAS FAILED TO PROVE THAT IT WAS A LONGSHOREMAN WHO HAD MISPLACED THE BIN BOARD IN ITS PRECARIOUS POSITION IS CLEARLY ERRONEOUS.

Appellant is fully aware of the burden of showing that the District Court has made a clearly erroneous finding. The finding that the Appellant failed to prove the identity of the person who placed the bin board in its precarious position is, however, clearly erroneous and has resulted in a clear injustice to Appellant.

The bin boards had to be in their proper places along the side slots of the access trunkway when the ship came into San Francisco because the No. 1 hold was fully loaded (R. 7, pp. 99-108, 161-163). It is impossible for the bin board to have been up in a precarious position on the bin board rack at sea with vessel pitching, yawing and rolling, because it would have fallen down (R. 7, pp. 138, 139).

There is no evidence that anyone from the vessel ever went into the access trunkway, after the inspection of the bananas one day before the vessel came into San Francisco and before the stevedore assumed full control (R. 7, pp. 122-127). The stevedore assumed full control with the start of operations at about 8:00 a.m. on June 4, 1960 (R. 4, pp. 23-25). Longshoremen always took out the bin boards from their side slots (R. 4, p. 21). There is no testimony that United Fruit Company employees *ever* dismounted the bin boards from their side slot positions. There is no testimony that anyone other than longshoremen *ever* handled bin boards in San Francisco while the vessel was here. There was no one in the hold at the time of the accident (or at least in the accident area) except the 34 longshoremen employed by Marine Terminals. And *somebody* misplaced the bin board.

The law states that a witness is presumed to speak the truth. Calif. C.C.P. §1847. With respect to the customs and practices and with respect to the actual handling of the bin boards on the day in question, none of the witnesses were impeached. It would be virtually impossible to prove that any particular person placed the bin board in its precarious position on the bin board rack lip. But the only testimony on the subject shows that only longshoremen handled the bin boards in San Francisco. The only possible factual conclusion as to the identity of the person who mishandled the bin board is that this person must have been a longshoreman.

Although the Court states that it is "disputed" that United Fruit Company employees would not have handled the bin boards at the critical moment in question (R. 1,

p. 96), the Court is simply stating that Marine Terminals Corporation and its counsel have "disputed" this proposition. There is no evidence in this record that United Fruit Company employees ever handled the bin boards at any of the critical times. There is ample proof that Marine Terminals' employees had to handle the bin boards and did so in fact.

It is manifestly unjust for the Court to refuse to draw the only reasonable factual conclusion, that the bin board must have been misplaced in its precarious position by a longshoreman employed by Marine Terminals. The Court's failure to draw this factual conclusion is clearly erroneous. The proper conclusion would result in a finding that some longshoreman employed by Marine Terminals misplaced the bin board in a precarious position, from which it subsequently fell without any intervening force. The placing of the bin board in a precarious position is obviously a breach of the warranty of safe and proper performance and should result in a holding of stevedore liability.

CONCLUSION

For the foregoing reasons we submit that the Judgment in favor of Marine Terminals Corporation should be reversed with directions to enter a judgment in favor of United Fruit Company upon its Third-party Complaint.

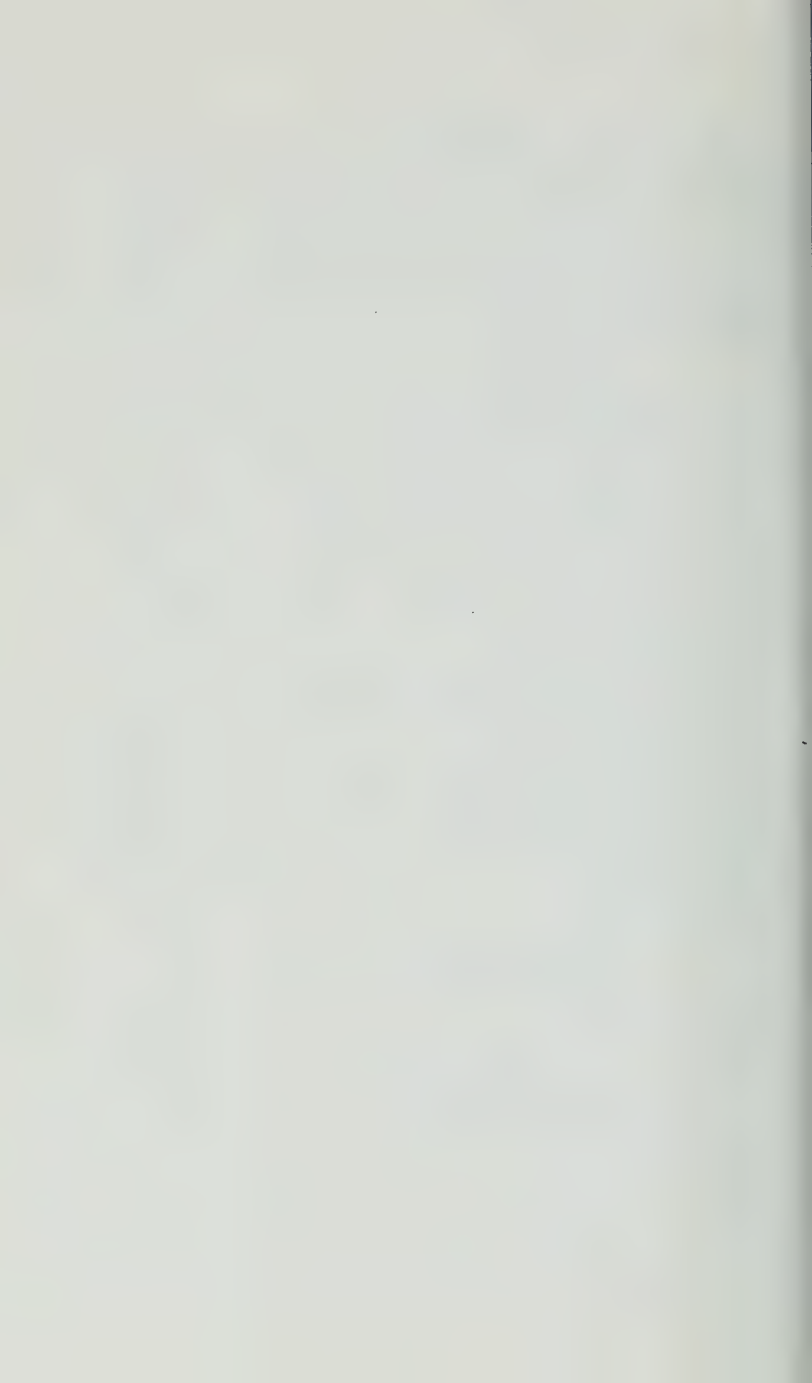
Respectfully submitted,
LILLICK, GEARY, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK W. WENTKER, JR.,
Of Attorneys for Appellant.

(Appendix Follows)



Appendix.

Appendix

TABLE OF EXHIBITS

Plaintiff Navarro's Exhibits	Identified	Admitted
1-A Photograph	*	*
1-B "	*	*
1-C "	*	*
1-D "	*	*
1-E "	*	*
1-F "	*	*
1-G "	*	*
1-H "	*	*
1-I "	*	*

Defendant and Third-Party Plaintiff United Fruit Company's Exhibits

A Ship blueprints	*	See R. 6, p. 5
B Access hatch plan	*	See R. 6, p. 5
C Hold loading plan	*	See R. 6, p. 5
E Log Book	R. 6, p. 7	R. 6, p. 8
F Hatch diagrams	R. 6, p. 6	R. 6, p. 6
14 Plaintiff's diagrams	R. 7, p. 24	*
15 Letter dated January 19, 1954	See R. 7, p. 24	R. 7, p. 25
16 Standards in Ship Construction	See R. 7, p. 24	R. 7, p. 25
17 Pacific Coast Marine Safety Code	See R. 7, p. 24	R. 7, p. 25
18 Letter dated November 28, 1951	See R. 7, p. 24	R. 7, p. 25
19 Diagrams	See R. 7, p. 24	R. 7, p. 25
20 United Fruit Budget Request	See R. 7, p. 24	R. 7, p. 25

*Portions of Navarro jury trial transcript omitted.

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IN THE
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Appellant,

VS.

MARINE TERMINALS CORPORATION,

Appellee.

BRIEF FOR APPELLEE

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WM. B. LUCK, CLERK

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No. 20,873

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED FRUIT COMPANY,

Appellant,

VS.

MARINE TERMINALS CORPORATION,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

Appellee incorporates in full Appellant's statement on jurisdiction.

STATEMENT OF THE CASE

Appellee has no quarrel with the first and third paragraphs (p. 2) of Appellant's "Statement of the Case". However, in particular, Appellee challenges Appellant's statement that most of the critical facts are not disputed, and that the findings are not sufficiently detailed for a comprehensive understanding of the accident. Appellant relies upon many claimed facts which were in dispute at the trial:

(a) That after inspection of the access trunkway the day before the accident "no one from the

vessel thereafter went into the access trunkway". This statement is contrary to the testimony of the stevedore company's walking boss, Mr. Hefferman (R. 4, pp. 30-31); the gang boss, Joseph Teixeira (R. 2, pp. 39, 46, 47).

(b) That the longshoremen took the small bin boards and "sometimes placed them in the storage rack" of the access trunkway. This was completely refuted by the longshore personnel whose testimony was heard and weighed by the trial court: Gang Boss Teixeira (R. 2, pp. 52-53, 55-57, 60-61); and Walking Boss Hefferman (R. 4, pp. 9-10, 21, 25, 26).

(c) That "the particular bin board was in place in its side slots when the ship came into San Francisco." There was no such evidence offered at the trial—aside from general custom and practice.

(d) That Appellee "was not only in control in fact, but also in control, as a matter of law" under the written contract. Walking Boss Hefferman testified, as did Gang Boss Teixeira, that the escape hatch (access trunkway) was not a part of the working area (R. 2, pp. 60-61; R. 4, p. 14), and that ship personnel were continuously in and out of this area during the stevedoring operations (R. 2, pp. 26, 39, 46, 47, 61; R. 4, pp. 14, 30, 31).

Finally, in its "Statement of the Case", Appellant asserts that the Court erred in finding that Appellant had failed to prove that a longshoreman had misplaced

the bin board in a precarious position. Appellee considers this argumentative statement to be completely without basis, as will hereafter be shown.

SUMMARY OF ARGUMENT

In Appellant's "Summary of Argument", it is claimed that by reason of the written contract existing between the shipowner and the stevedore, the responsibility for the accident was thrust upon the stevedore company. It is argued that the contract provided that the stevedore was to be "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operation", and therefore, the mere happening of an accident in the area of work operations placed exclusive responsibility upon the stevedore. The District Court's finding that Appellant failed to meet its burden of proof is claimed to be erroneous. This is based on the tenuous argument that the evidence "indicates" that only longshoremen handled the bin boards while the vessel was in San Francisco.

As hereinbefore stated, Walking Boss Heffernan and Gang Boss Teixeira testified that longshoremen never placed bin boards in the rack from which the offending board fell. On cross-examination by Appellant's counsel, Mr. Heffernan made it quite clear that longshoremen never used this rack for storage of the short bin boards (R. 5, pp. 21, 25, 26). The District Court accepted the reliability of this testimony.

Indeed, the only logical finding the trial court could make in the light of the evidence presented, was that liability against the stevedore company had not been established by Appellant.

ARGUMENT

I

THE PROVISIONS OF THE CONTRACT AS APPLIED TO THE EVIDENCE DO NOT IMPOSE LIABILITY ON THE STEVEDORE.

The District Court gave full consideration to the provisions of the contract, and on the basis of all the evidence, found against the shipowner and in favor of the stevedore. Appellant indulges in theorizing on the intended responsibilities under the contract, which was drawn up by the shipowner. It is axiomatic that any ambiguity must be resolved against the maker of the contract.

Appellant contends that under the contract, the stevedore company is deemed to be "in full control" of the working area. There was testimony in the case that the access hatchway from which the bin board fell was not considered by the longshoremen to be a part of the working area, and furthermore, that this access trunkway was continuously used by ship personnel, as well as by the longshoremen (R. 2, pp. 26, 39, 46, 47, 60, 61; R. 4, pp. 14, 30, 31).

In view of the foregoing, and in the face of positive evidence that longshoremen never placed bin boards in the rack in question, and a complete lack of any

acceptable testimony to the contrary, it is difficult to comprehend Appellant's statement that the trial court "failed completely to give effect to the contract provision for control and did so without so much as suggesting a reason for its invalidity". This would appear to be more in the nature of an unfounded assertion, rather than valid argument against the trial court's finding that the shipowner failed to meet the burden of proof.

II

THE TRIAL COURT'S FINDING THAT THE SHIPOWNER FAILED TO PROVE THAT A LONGSHOREMAN MISPLACED THE BIN BOARD IN ITS PRECARIOUS POSITION IS AMPLY SUPPORTED BY THE RECORD AND IS THEREFORE NOT CLEARLY ERRONEOUS.

Federal Rules of Civil Procedure Rule 52 provides, in part, as follows:

"Rule 52. Findings By The Court.

(a) *Effect*

"... Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

Appellant endeavored to prove, through custom and practice that ship's personnel did not use the access trunkway from the time the stevedoring operations commenced up to the happening of the accident, some three hours later. It is argued that the bin boards in the access trunkway "had to be in their proper places" when the ship came into San Francisco, because the

No. 1 hold was fully loaded; and that it would have been impossible for the bin board to have been in a precarious position in the bin-board rack while the vessel was pitching and yawing and rolling on its trip to San Francisco "because it would have fallen down." If one is to indulge in speculation, one might also suggest that the pitching and yawing caused the offending bin board to become partially dislodged.

It was established through testimony of Gang Boss Teixeira that only two bin boards would have to be in place in the access trunkway to keep the bananas from falling—although there are five or six bin boards provided for that purpose (R. 2, p. 42). Just how many were in place and how many were in the rack of the access trunkway was never shown by any direct evidence.

All of the stevedore employees testified that the longshoremen never place the small bin boards in the rack in the access trunkway and were never told to use this rack. They always stored the bin boards in the wings, away from from the access trunkway.

With reference to Appellant's statement (page 17 of its brief) that there was no testimony that "United Fruit Company employees *ever* demounted the bin boards from their side slot positions", it would indeed be illogical to suggest that this, therefore, proves that employees of the stevedore company "demounted" the bin boards and then placed one of them in a precarious position in the rack.

Its further assertion that there is no testimony in the record that anyone other than longshoremen ever

handled bin boards while the vessel was in San Francisco can be of no particular aid or comfort to Appellant in light of its inability to prove that one of the stevedore workmen placed the precariously stored bin board in the access trunkway rack. The only direct evidence that anyone ever placed the small bin boards in this particular rack is in the deposition testimony of the vessel's Chief Mate, Andrew Nielsen, who testified it was his custom and practice between ports of call to pick up bin boards on the deck and place them in this rack in the access trunkway (R. 7, p. 136).

The trial court, therefore, had the testimony of the longshore personnel that they never placed small bin boards in the rack in the access trunkway; while on the other hand, Chief Mate Nielsen admitted that it was his practice to place these bin boards in this rack.

From all this, Appellant seeks to have this Court overturn the trial court's substantially supported finding that none of Appellee's employees were guilty of having placed the small bin board in a precarious position in the rack in the access trunkway.

A prime example of failure on the part of Appellant to fasten liability on the stevedore company is the testimony of David Harold Wild, terminal superintendent for the shipowner, and one of its chief witnesses. Mr. Wild testified that he was in close contact with the walking bosses employed by Marine Terminals in this entire operation to see that it was properly and efficiently performed. He observed no mishandling of the bin boards, neither did he have any knowledge as to whether some of the bin boards were in the rack

of the access trunkway (R. 5, pp. 54-55). The foregoing hardly supports Appellant's argument "that the bin board must have been placed in its precarious position by a longshoreman employed by Marine Terminals" (Appellant's Brief, p. 18).

Appellant has failed to overcome the provisions of Rule 52(a), the strict requirements of which are so aptly stated by Judge Sanborn in the case of *Cleo Syrup Corp. v. Coca-Cola Co.* (CCA 8th, 1943), 139 F.2d 416, 417-418, 150 ALR 1056, cert. den. (1944), 321 U.S. 781, 64 S.Ct. 638, 88 L. ed. 1047:

"This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court (citing cases). The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly (citing cases). In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law (citing cases). . . . In determining whether there is a sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inferences deducible therefrom which is most favorable to the plaintiff."

CONCLUSION

For the reasons set forth herein, it is submitted that the lower court's judgment should be sustained.

Dated, San Francisco, California,
December 22, 1966.

Respectfully submitted,
EDWARD R. KAY,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD R. KAY,
Attorney for Appellee.



No. 20,873

IN THE
United States Court of Appeals
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UNITED FRUIT COMPANY,

Appellant,

vs.

MARINE TERMINALS CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

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VS.

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Appellee.

APPELLANT'S REPLY BRIEF

THE RECORD

In its Statement of the Case, Appellee, under headings (a), (b) and (c), asserts three disputes with Appellant:

(a) Appellee quotes "No one from the vessel thereafter went into the access trunkway" from Appellant's Brief (p. 4). This statement was taken out of its context, in which it pertains only to the period *before* the stevedore took over control at San Francisco. On the other hand, the testimony cited by Appellee relates only to the period *after* the stevedore took over. Appellant's Brief, however, makes clear that Appellant does not argue that none of its employees entered the area at the later period (see Appellant's Brief, p. 17).

(b) Appellee quotes Appellant's statement that the longshoremen took the boards and "sometimes placed

them in the storage rack'' from Appellant's Brief, p. 2, and challenges the quoted portion on the basis of testimony of laborers Teixeira and Heffernan.

Mr. Wilde definitely saw longshoremen place some of the bin boards in the rack on some occasions (R. 5, p. 26). Chief Mate Neilsen regularly cleaned up the holds of the ship with the crew of the ship *after* the vessel left San Francisco and was at sea, and *always* found some bin boards already replaced in the rack (R. 7, pp. 130-137).

It is true that longshoreman Teixeira testified that longshoremen "never" placed bin boards in the rack, and it is also true that longshoreman Heffernan, who was *not even on the ship* on the day of the accident (R. 4, p. 23), testified that longshoremen "never" put bin boards into the rack. However, neither man was in the bridge 'tween deck (the level from which the bin board fell) at the time that the bin boards were admittedly dismantled from their side slots by other longshoremen on the morning of the day in question, and neither witness could possibly know what the particular longshoremen employees of the stevedoring contractor, *none* of whom testified on behalf of their employer, actually did with these bin boards on that particular day. After the incident Teixeira found several boards safely in the rack (R. 2, p. 22), indicating clearly that someone had recently placed some boards in the rack.

(c) Appellee quotes "The particular bin board was in place in its side slots when the ship came into San Francisco" from Appellant's Brief, p. 6, and, while pointing to no contrary evidence, claims that this statement was supported only by custom and practice.

There was ample testimony by Captain Bornholdt, Chief Mate Neilsen, and Chief Engineer Cardin (R. 6, p. 28; R. 7, pp. 99-105, pp. 159-161), that the bin boards in *this* particular ship on *this* particular voyage one day before the accident were in fact *all* in place in the side slots before the stevedore assumed control. No one from the vessel thereafter went into the access trunkway until the stevedore took over control (R. 7, pp. 122-125).

The stevedoring contractor has not pointed to a single portion in the record which disputes the above testimony in any respect concerning this particular voyage, or any other voyage. After combing the record on appeal, the only evidence which the stevedore says in any respect contradicts the testimony of these three senior officers of the vessel with years of actual seagoing experience, is the testimony of a temporary day laborer, Gang Boss Teixeira, who in one sentence in cross-examination offered an *opinion* to the effect that only two bin boards might be necessary to hold the bananas in place when the ship was at sea (Appellee's Brief, p. 6).

There is no evidence that Teixeira *ever* saw on this day, or any other day, how many bin boards were necessary to hold the bananas in place at sea, or that he had any factual basis for any opinion as to how many boards were necessary to hold the bananas in place at sea. In addition, he could not possibly have known on this particular day how many bin boards actually held the bananas in place at the bridge 'tween deck (from which the bin board subsequently fell), because he never worked in that area, and never looked at that area until a few seconds before the accident. When Teixeira did look, the bin

boards had already been taken down by the other longshoremen who worked the bridge 'tween deck level that day.

THE ARGUMENT

I. THE CONTRACT

Appellee seeks to avoid the effect of the written contract by oral testimony of two of its laborers, Teixeira and Heffernan, to the effect that the access trunkway was, in their opinion, not a "working area" (Appellee's Brief, p. 4), whatever that may mean (obviously bananas were not stowed in the trunkway). Appellee does not dispute that the access trunkway and bin board arrangement was built at the request of the longshoremen, for the use of longshoremen, and was used in fact by longshoremen for many years.

Appellee apparently seeks to avoid the burdens of control placed upon stevedores by the United States Department of Labor in Code of Federal Regulations, Title 29, Chapter XIII, § 1504.25, which specifically fixes responsibility for the safety of ladders and their accessibility upon the stevedore, and thus clearly brings ladder spaces within the area of "stevedoring operations," or as appellee prefers to call it, the "working area."

Appellee also asserts that "the District Court gave full consideration to the provisions of the contract . . ." (Appellee's Brief, p. 4), but does not cite any portion of the record for this statement. The District Court quite evidently forgot about the written contract. Appellant can give no other reasonable explanation for the Court's total

failure to mention the contract in its Memorandum Opinion and Findings of Fact and Conclusions of Law (R. 1, p. 94), which were prepared by the Court.

II. THE FINDING OF FAILURE OF PROOF THAT THE BIN BOARD WAS ACTUALLY MISPLACED BY A LONG-SHOREMAN

Appellant has already dealt with Appellee's assertion concerning the question of whether United Fruit Company employees may possibly have been in the access trunkway at some time after the stevedore assumed control, but before the minute of the accident, under (a) *supra*.

Appellee, at page 6, points to one sentence of the testimony of temporary laborer Teixeira and asserts that the record supports the inference that the Chief Mate, the Captain, and the Chief Engineer, all senior seagoing officers with extensive experience, were incorrect in asserting that all of the bin boards were in their places in side slots when the ship came into San Francisco. Appellant has dealt with this portion of the Argument under (c) *supra* in this Reply Brief. In addition, the Court certainly can understand that the stevedoring contractor would have countered the testimony of the three senior ship's officers on this point with its own senior supervisory personnel, had there been any real question as to the accuracy of the officers' testimony. The same stevedoring contractor worked these identical ships once a week for almost four years between 1957 and 1961 (R. 7, p. 206). In fact, the District Court never made any finding indicating that it doubted the testimony of the ship's officers concerning this issue.

Appellee, at the bottom of page 7 and the top portions of page 8, admits that only longshoremen demounted the bin boards from their side slots. Appellee also does not challenge the fact that only longshoremen ever handled bin boards while the vessel was in San Francisco. The vessel is a place of limited access, open only to longshoremen and United Fruit Company personnel. If United Fruit Company personnel never handled the bin boards in any respect while the ship was in San Francisco, and there is no contrary evidence, who is left to have placed the bin board in its precarious position after it was demounted, other than one of the 35 longshoremen working for Appellee in the No. 1 hold of this vessel?

Appellee also states (p. 8) that Appellant's employee Wilde observed no mishandling of the bin boards on the day in question, and that this somehow aids Appellee. The admitted fact is that although Appellee and its employees had immediate notice of the accident, they never reported the accident to Appellant. Appellee even went so far as to send its Insurance Manager, Captain Reitsma, to investigate aboard the ship on the day of the accident (R. 7, p. 191), but he too, said nothing to Mr. Wilde or to anyone else from United Fruit Company about the accident. Appellant finds the stevedore's reluctance even to report the accident to United Fruit Company inconsistent with the stevedore's protestations of innocence concerning the misplacing of the offending bin board.

In fact, Appellant finds Appellee's failure to offer any explanation for the accident, except to claim that the vessel cannot prove that a particular longshoreman misplaced the bin board, very strange, in the face of the

admitted fact that 35 employees of Appellee worked in the No. 1 hold on the day in question, the admitted fact that only longshoremen were in the immediate area of the accident at the moment of its occurrence, the very stringent control burdens under the written contract, and the warranty of safe and proper performance under the decision in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 1956 A.M.C. 9.

CONCLUSION

For the foregoing reasons we submit that the Judgment in favor of Marine Terminals Corporation should be reversed with directions to enter a judgment in favor of United Fruit Company upon its third-party Complaint.

Dated, San Francisco, California,
February 10, 1967.

Respectfully submitted,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

FREDERICK W. WENTKER, JR.,
Of Attorneys for Appellant.



No. 20,876 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHNNY R. AUSTAD and DOROTHY
AUSTAD, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

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No. 20,876

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AUSTAD, his wife,

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vs.

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Appellee.

APPELLANTS' OPENING BRIEF

I

STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of Appellee, United States of America, rendered by the United States District Court for the District of Arizona in an action by the Appellee for foreclosure of a mortgage held by the Small Business Administration, a federal agency, and upon a written guaranty for payment of a note. Jurisdiction was based upon the provisions of 28 USC 1345. Jurisdiction of this Court is invoked under the provisions of 28 USC 1291 and 1294. A timely Notice of Appeal was filed on

January 31, 1966, within thirty (30) days after entry of judgment on January 11, 1966 (CTR¹ 84-93).

II

STATEMENT OF THE CASE

A. The Nature of the Controversy.

On December 10, 1964, Appellee, United States of America, filed its civil action against the Appellants, Johnny R. Austad and Dorothy Austad, his wife, and other parties including the Austad Steel Co., Inc., a bankrupt, to foreclose a mortgage executed by the Austad Steel Co., Inc., an Arizona corporation, the mortgagor, in favor of the Small Business Administration, a federal agency, the mortgagee, to secure payment of the former's promissory note, the unpaid balance of which then amounted to \$165,992.91 together with interest, expenses and costs of suit, and to recover on a written guaranty executed by the Appellants in favor of the Appellee, dated December 17, 1958, guaranteeing the unconditional payment of said note when due. Said mortgage and note were entered into on December 17, 1958. The mortgagor, Austad Steel Co., Inc., defaulted on its monthly installment due September 17, 1959, and on June 20, 1960 was adjudicated bankrupt (CTR 2-21).

By their Amended Answer, the Appellants admitted substantially all the factual allegations of the Com-

¹Parenthetic references preceded by "CTR" are to the Clerk's Transcript of Record.

plaint, including execution of the mortgage and note by Austad Steel Co., Inc., their written guaranty of said note, the default of Austad Steel Co., Inc., on December 17, 1959, and the adjudication of bankruptcy of Austad Steel Co., Inc., on June 20, 1960, but they denied that any demands were made upon them for payment of the balance due under the note until filing of this action December 10, 1965, approximately five (5) years and three (3) months after the note became due and payable, and additionally raised four affirmative defenses (CTR 63-64):

1. Appellee failed to bring this action on the indebtedness within sixty days after demand by Appellants therefor as required by Arizona Statute (Arizona Revised Statutes §§12-1641 and 12-1646);

2. Appellants were released under their written guaranty by Appellee's action in repeatedly waiving principal payments when due and accepting only interest payments on the obligation;

3. Appellee was barred by laches from prosecuting its action there having elapsed a period of approximately five (5) years and three (3) months from the date of default and the filing of its Complaint; and

4. Appellee was estopped to recover on Appellants' written guaranty because of its willful and unconscionable delay in bringing this action from the date of default, September 17, 1959, and the date of filing of its Complaint, December 10, 1964, a period of approximately five (5) years and three (3) months, which delay greatly diminished the value of the se-

curity for the note causing irreparable harm to the Appellants.

Appellants attached to their Amended Answer a copy of a letter from J. R. Austad to the Small Business Administration dated September 19, 1961, in which demand was made to bring an action on the note and mortgage immediately.

On July 21, 1965, Appellee moved for Judgment on the Pleadings (CTR 57-59) which was granted as to these Appellants on August 2, 1965 (CTR bet. 67 and 68). A Judgment and Decree of Foreclosure was entered on January 11, 1966, against Appellants Johnny R. Austad and Dorothy Austad and also against the Austad Steel Co., Inc., in the total amount of \$213,092.50, together with interest thereon (CTR 84-92).

B. Questions Involved.

1. Were the Appellants released on their written guaranty by the failure of the Appellee to bring an action on the indebtedness within sixty (60) days after demand by them to do so?

2. Was the Appellee estopped from bringing this action on the ground of laches?

3. Were the Appellants discharged on their written guaranty by Appellee's willful destruction and impairment of the security?

4. Were there questions of fact raised by Appellee's Complaint and Appellants' Amended Answer which would prevent entry of a judgment upon a motion for Judgment on the Pleadings?

C. Specifications of Errors.

1. The District Court erred as a matter of law in holding that Appellee had not released Appellants on their written guaranty by failing to bring an action on the indebtedness within sixty (60) days after demand by them to do so.

2. The District Court erred as a matter of law in holding that Appellee was not estopped from bringing this action on the ground of laches.

3. The District Court erred as a matter of law in holding that Appellants were not released on their written guaranty by Appellee's willful destruction and impairment of the security.

4. The District Court erred as a matter of law in entering a Judgment and Decree of Foreclosure as to these Appellants on Appellee's motion for Judgment on the Pleadings where factual issues were raised by the pleadings.

III

ARGUMENT

A. APPELLANTS WERE RELEASED ON THEIR WRITTEN GUARANTY BY THE FAILURE OF THE APPELLEE TO BRING AN ACTION ON THE INDEBTEDNESS WITHIN SIXTY DAYS AFTER DEMAND BY THEM TO DO SO.

Under Arizona law, sureties and guarantors under written contracts for the payment of money have a right to require by notice in writing that the creditor or obligee bring an action under the contract forthwith, and if the creditor or obligee fails to bring such action the surety or guarantor giving such notice will be discharged from all liability thereon.

Arizona Revised Statutes §12-1641 reads as follows:

“Action by creditor; failure to bring action and effect

Any person bound as surety upon a contract for payment of money or performance of an act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to bring an action upon the contract. If the creditor or obligee, not being under legal disability, fails to bring the action within sixty days after receiving the notice, and prosecute it to judgment and execution, the surety giving the notice shall be discharged from all liability thereon.”

Arizona Revised Statutes §12-1646 extends this remedy to guarantors as well as sureties.

On a motion for Judgment on the Pleadings, all well pleaded material allegations of the opposing parties' pleadings are to be taken as true, and all allegations of the moving party which have been denied are taken as false.

Wyman v. Wyman, CA 9, 109 F.2d 473;

2 Moore's Federal Practice 2269, Para. 12.15
and other cases cited in footnote 7.

On an appeal from a Judgment entered on such a motion this Court must accept the allegations of the Appellants in their Amended Answer as true, to wit: Appellee failed to bring an action on the indebtedness within sixty (60) days following demand by Appellants to do so. As stated in *Phenix v. Bijelich*, 30 Nev. 257, 269, 95 P. 351, 353, cited by the Ninth Circuit Court in *Wyman v. Wyman*, supra:

“When a party moves for judgment on the pleadings, he not only for the purposes of his motion admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations which have been denied by this adversary.”

Appellants did not waive their rights under the above cited Arizona statutory provisions (Exhibit C, CTR 21) and any such attempted waiver would have been null and void as against public policy, since such statutory provisions are enacted to protect debtors from oppression. This result has been reached under similar statutory provisions in California, viz: California Code of Civil Procedure §726 providing for one form of action to recover on a debt secured by a mortgage, and California Civil Code §2924(c) providing for a three-month period after default in which time the creditor may reinstate the loan, and is so expressed in California Civil Code §2953.

Tomczak v. Ortega, 240 CA 2d 902;

Altman v. McCollum, 107 CA 2d Supp. 847.

The law on this point has been summarized in 34 Cal. Jur. 2d at pages 102-103:

“The statute [C.C.P. §726] providing for but one form of action to recover any debt or enforce any right secured by a mortgage was enacted to promote the public welfare by protecting debtors from oppression. It must be construed as declaring public policy of the state and cannot be waived by contract. A provision in a trust deed waiving the benefit of this provision is inconsistent with the purpose of the entire instrument

and attempts to destroy its legal effect as a trust deed. . . . This general understanding is now incorporated in a statute [CC §2953] that provides that an express agreement whereby a borrower, at the time of or in connection with the making or renewing of any loan secured by a trust deed, mortgage, or other instrument creating a lien on real property, agrees to waive the rights or privileges conferred on him by various code sections, including the one under consideration, is void and of no effect."

Accordingly, when the Appellee failed to bring an action on the indebtedness within sixty days following demand by Appellants that it do so, the Appellants were discharged from all liability thereon.

**B. APPELLEE IS ESTOPPED FROM BRINGING
THIS ACTION BECAUSE OF LACHES**

Appellants specially pleaded the defense of laches in their Amended Answer (CTR 63, 64). Laches has been defined as an inexcusable delay in asserting a right, and entails (1) an unreasonable delay and (2) prejudice to the defendant.

Tovrea Land and Cattle Company v. Linsensmeyer, 100 Ariz. 107, 412 P.2d 47, 64;

Barr v. Petzhold, 77 Ariz. 399, 273 P.2d 161, 165;

Price v. Sunfield, 57 Ariz. 142, 112 P.2d 210, 212;

Hamud v. Hawthorne, 52 C.2d 78;

King v. Los Angeles County Fair Assn., 70 CA
2d 592, 596;

30A Corpus Juris Secundum, "Equity", §§112
et seq.;

Witkin, California Procedure, "Pleading",
§490;

Witkin, Summary of California Law, "Equity",
§§ 12, 13.

In *Barr*, supra, the Arizona Supreme Court stated at
p. 165:

"This Court recognizes as meritorious the defense
of laches. The general rule is that a plaintiff
must exercise diligence and avoid unreasonable
delay in prosecuting an action. The reason for
this rule is that unreasonable delay and lack of
diligence either evidence an abandonment by the
plaintiff of his claim or else prejudice in some
way the defense against such claim."

Laches may bar relief in equity irrespective of
whether the Statute of Limitations has run on the ac-
tion at law.

Alger v. Brighter Days Mining Corp., 63 Ariz.
135, 160 P.2d 346, 352.

In *Alger*, supra, the Court held that a minority
stockholder was guilty of laches though the suit was
brought *after three years* and within the Statute of
Limitations because of prejudice to the defendant
corporation stating at pp. 349 and 352:

"Plaintiffs stood by and refrained for more than
three years before any legal action was com-
menced by them during which period large sums

of money had been expended upon the property by Brighter Days, and numerous persons had purchased stock in the new company.”

* * *

“It is well settled that a minority stockholder may lose his right to sue or defend on behalf of the corporation if unreasonably delaying, with knowledge of the facts, to bring suit.”

In *King*, supra, a delay of two years was sufficient to justify a refusal to set aside a transfer of assets of a nonprofit corporation. And in *Hamud*, supra, plaintiff mortgagors gave a quitclaim deed to permit strict foreclosure on default, and then *after 5 years* sought to have the deed declared a mortgage. The Court denied relief because they had waited too long and there had been a change in the circumstances (interest of oil company in property) in the meantime.

On this Appeal the following facts must be accepted as true: The Appellee wilfully delayed filing its action for approximately five (5) years and three (3) months during which time the security for the note greatly diminished, causing Appellants irreparable harm. [See Appellants’ Amended Answer, CTR 63-64; Complaint, First Cause of Action, Para. IX, CTR 5, Clerk’s Docket Entries CTR 77, and pages 6 and 7 of this Brief, supra.] Accordingly, if these facts are so, it is submitted that this action is barred from prosecution by reason of laches.

Appellee contended below, however, that the defense of laches was not applicable against the United States as the result of any action or inaction of its agents or

employees in an action of this sort. *But this applies only when the United States is acting in its governmental capacity. When it acts in a proprietary capacity or enters into contractual relationships an estoppel may be asserted against it provided the functions of government are not impaired thereby.*

U.S. v. New Orleans Pac. Ry. Co., 248 U.S. 507;

La Republique Francaise v. Saratoga Vichy Spring Co., 191 U.S. 427;

U.S. v. Bank of America, D.C. Cal., 47 F. Supp. 279;

City of Los Angeles v. County of Los Angeles, 9 C.2d 624;

30A Corpus Juris Secundum, "Equity", §114, and cases cited in footnote 35;

27 American Jurisprudence 2d "Equity", §156.

In *La Republique Francaise* the government of the French Republic sued to enjoin use of the name "Vichy". The defense of laches was asserted on the ground that the French government had done nothing for thirty years to protect its interest in this name. The Court held that this defense was applicable to the French government where they were acting for the protection of a *private and proprietary interest*. Quoting from the Court's opinion at page 438:

"In such cases either where the government is suing for the use and benefit of an individual or for the prosecution of a private and proprietary, instead of a public or governmental right, it is clear that it is not entitled to the exception of

nullum tempus, and that the ordinary rule of laches applies in full force.” (Cases cited)

And in *U.S. v. Bank of America*, supra, the United States delayed almost 21½ years before notifying banks which had collected checks on forged endorsements. The Court, Judge Roche, entered judgment for the defendant holding that the defense of laches was applicable to the government when engaged in private commercial activities, stating at page 281:

“Even if neither of the foregoing theories were applicable the Government might well be barred by its long delay in notifying the defendants after discovery of Howlett’s fraud. When the United States issues commercial paper it does so on the same basis as any individual and with no special privileges. *Cooke et al. v. United States*, 91 U.S. 389, 398, 23 L.Ed. 237. And while it will not be bound by the state statute of limitations, like any other litigant it may be guilty of laches. (Cases cited) Laches is a valid defense if the delay appears to have prejudiced the defendant.”

The case of *United States v. Summerlin*, 310 U.S. 414 cited by Appellee below (CTR 59) involved a claim assigned to the Federal Housing Administrator in its governmental capacity, and not in its proprietary capacity. The right asserted here however involves the foreclosure of a mortgage and collection of a note arising out of the government’s activities through the Small Business Administration an executive agency of the United States (CTR 2-21) engaged in the business of making loans to private individuals

and corporations. 15 USC §661; *First Louisiana, Inc., Corp. v. U.S.*, 5 CA 1965, 351 F.2d 495. These activities clearly show that *the government was acting here in a private and proprietary and not in a governmental capacity*, just as it and the French Republic were acting in the cases above cited. Accordingly the defense of laches would be equally applicable to it as to any individual.

C. APPELLANTS HAVE BEEN RELEASED FROM THEIR WRITTEN GUARANTY BY REASON OF APPELLEE'S WILLFUL IMPAIRMENT OF THE SECURITY.

Where a creditor does an act or fails to perform an act whereby injury or loss accrues to the surety without his assent, the surety is entitled to be discharged.

Roberts v. Security Trust & Savings Bank, 196 C. 557;

46 Cal. Jur. 2d 256, 257, "Suretyship and Guaranty".

So in the instant case, where Appellee by its inaction over a period of approximately five (5) years and three (3) months willfully permitted the security to greatly depreciate in value without the assent of the Appellants, the latter are entitled to be discharged from their written guaranty.

Appellee contended below that by the terms of the written guaranty Exhibit "C" to the Complaint (CTR 21) Appellants had conferred upon the Small Business Administration full power in its uncontrolled dis-

cretion and without notice to them to deal in any manner with the security (CTR 57-59). However, this did not give it the right to destroy or diminish the value of the security *by any willful act or willful failure to act*. The written guaranty in this connection provides as follows (CTR 21):

“The obligations of the undersigned hereunder and the rights of SBA in the collateral, shall not be released, discharged, or in any way affected, . . . by reason of any deterioration, waste, or loss by fire, theft or otherwise of the collateral *unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of SBA*” (emphasis supplied).

Accordingly by the very terms of the written guaranty to which SBA is bound as a party, the Appellants have been released therefrom because of SBA's willful destruction of the security.

D. THE PLEADINGS RAISED FACTUAL ISSUES WHICH PREVENTED ENTRY OF JUDGMENT ON THE PLEADINGS.

It is well established that a plaintiff may not move for judgment on the pleadings where the Complaint and Answer raise issues of fact which if proved would defeat recovery.

Caterpillar Tractor Co. v. International Harvester Co., CA 9, 1939, 106 F.2d 769;

2 Moore's Federal Practice, 2268-2270, Para. 12.15 and cases cited in footnote 12.

In the instant case Appellee's Complaint (CTR 2-21) and Appellants' Amended Answer (CTR 63-64) raised the following factual issues:

1. Did Appellants make demand upon Appellee to bring an action on the note on or about September 19, 1961?

2. Did Appellee fail to bring an action on the indebtedness within sixty days following said demand?

3. Did Appellants make repeated demands on the Appellee to exercise its rights with dispatch?

4. Did Appellee willfully delay bringing its action for approximately five (5) years and three (3) months?

5. Did Appellee's willful delay in bringing its action for approximately five (5) years and three (3) months greatly diminish the value of the security for the loan causing irreparable harm to Appellants?

Any or each of the foregoing factual issues if proved would have defeated recovery by the Appellee on its Complaint as against these Appellants in the light of the principles of law set forth hereinabove under headings "A", "B", and "C". Accordingly the Judgment entered below on Appellee's Motion for Judgment on the Pleadings was not authorized under Rule 12 (c) of the Federal Rules of Civil Procedure and should be reversed.

CONCLUSION

It is respectfully submitted, for each of the reasons hereinabove set forth, that the judgment entered in favor of Appellee and against Appellants be reversed and the action remanded for further proceedings in the District Court.

Dated, San Francisco, California,
February 6, 1967.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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FOR THE NINTH CIRCUIT

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Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE **NINTH** CIRCUIT

No. 20,876

JOHNNY R. AUSTAD AND DOROTHY AUSTAD,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was brought by the United States to fore-
close a mortgage held by the Small Business Administration
on certain property of the Austad Steel Co., and for a
deficiency judgment on the note secured thereby against
the Company and against the appellants as guarantors.
The jurisdiction of the district court was invoked under
28 U.S.C. 1345. Final judgment granting the requested
relief was entered on January 11, 1966. Appellants filed

a timely notice of appeal (R. 97). 1/ The jurisdiction of this Court is based on 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

In December, 1958, the Austad Steel Co., Inc. (hereinafter referred to as "the company") borrowed \$250,000.00 from the Small Business Administration (SBA), an agency of the United States Government. In return for that sum, the company, by its president and Secretary-Treasurer, appellants herein, executed a note for that amount (R. 12-13). That note was executed on SBA printed form No. 147, and provided, as here relevant (R. 12-13):

The security rights of Payee and its assigns hereunder shall not be impaired by * * * any indulgence, including but not limited to (a) any renewal, extension, or modification which Payee may grant with respect to the Indebtedness or any part thereof, or (b) any surrender, compromise, release, renewal, extension, exchange, or substitution which Payee may grant in respect of the Collateral, or (c) any indulgence granted in respect of any endorser, guarantor, or surety.

In addition, the SBA received as security a mortgage on certain real property of the company (R. 14-20), and also an individual unconditional guaranty of payment by the Austads, appellants herein (R. 21). That guaranty of the company's debt to SBA was executed, as required by SBA practices, on SBA printed form No. 148, and provided that:

1/ "R" citations are to the Transcript of Record prepared by the clerk.

The undersigned hereby grants to SBA full power, in its uncontrolled discretion and without notice to the undersigned, but subject to the provisions of any agreement between the Debtor or any other party and SBA at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

- (a) To modify or otherwise change any terms of all or any part of the Liabilities 2/ or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to SBA), to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto;
- (b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral and to change the terms of any such agreement;
- (c) To forbear from calling for additional collateral to secure any of the Liabilities or to secure any obligation comprised in the collateral;
- (d) To consent to the substitution, exchange, or release of all of any part of the collateral, whether or not the collateral, if any, received by SBA, upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by SBA;

/ The term "Liabilities" is defined in the guaranty as the note, the interest thereon, and all other sums payable with respect thereto.

- (e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as SBA may elect, * * * or by foreclosure or otherwise, or to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.

The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against SBA, by reason of any action SBA may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of SBA, will pay to SBA the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned. SBA shall not be required, prior to any such demand on, or payment by, the undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral. The undersigned shall have no right of subrogation whatsoever with respect to the Liabilities or the collateral unless and until SBA shall have received full payment of all the Liabilities.

The obligations of the undersigned hereunder * * * shall not be released, discharged or in any way affected, nor shall the undersigned have any rights against SBA * * * by reason of the fact that the value of any of the collateral, or the financial condition of the Debtor * * * may have changed or may hereafter change; nor by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of SBA. (Emphasis supplied).

On December 10, 1964, a complaint was filed by the United States in the United States District Court for the District of Arizona (R. 2-10, 77) alleging, inter alia, the above facts, as well as the default by the mortgagor. The Government sought a decree of foreclosure of the mortgage against the company, and a deficiency judgment against both the company and the Austads as guarantors (R. 10-11).

The Austads, in their amended answer (R. 63-64), 3/ admitted all the above facts, but asserted as affirmative defenses (1) that the United States failed to bring an action on the indebtedness within sixty days after demand by defendants to do so (R. 65), (2) that the United States was estopped by its "unconscionable" and "willful" delay in bringing this action to recover on the guarantee (R. 63-64), (3) that the United States was "guilty of laches which bar it from recovery" against the Austads on the guarantee (R. 64) and (4) that the Austads were released under the guarantee agreement by the United States "repeatedly waiving principal payments when due and accepting interest only on the obligation" (R. 64). 4/

3/ The Austads had left Arizona, and it was necessary to obtain service on them in California (R. 99). Other defendants were served in California and Texas as well as Arizona (R. 99).

4/ Appellants do not argue this defense to this Court, and it is not further discussed.

The United States then moved for judgment on the pleadings (R. 57), asserting that it was entitled to judgment as a matter of law on the admitted facts in the pleadings. This motion was resisted by the Austads (R. 65-67). By minute entry of August 2, 1965 (set forth on an unnumbered page of the Record following R. 67), the district court determined that the government's motion should be granted.

On January 11, 1966 the court entered a final judgment and a decree of foreclosure (R. 84-92). As here relevant, judgment was entered against the Austads for \$213,092.50 (R. 87-88). 5/ From that judgment the Austads have appealed.

ARGUMENT

INTRODUCTION

The Austads unconditionally guaranteed payment of the note of the company which they controlled in order to obtain a loan from SBA. Both the note and the guaranty were executed on the required printed SBA forms used nationwide for this purpose. Now that the loan is in default, they attempt to avoid or delay enforcement of their obligation by asserting that the government's exercise of the rights specifically given it by appellants in the guaranty agreement in order to obtain the loan for their company somehow released them from their obligation.

5/ That amount to be reduced by the proceeds from the foreclosure sale.

We show that the rights of the parties under the printed notes and guaranties utilized by SBA in its nationwide program are governed by federal law which excludes state rules which are inconsistent therewith. The federal rule in this case is that set forth in the printed note and guaranty. We then show that the defenses which appellants assert have all been waived by them for their own economic benefit, and may not be raised here to defeat recovery.

I. FEDERAL LAW GOVERNS THE CONSTRUCTION OF THIS CONTRACT OF GUARANTY AND COMPELS A UNIFORM INTERPRETATION.

A. The Paramount Federal Interest In The Integrity of the Nationwide Program Of Assistance To Small Business Compels Initial Reference To Federal Law.

It is by now well settled that Congress has by the Rules of Decision Act, 28 U.S.C. 1652, provided for the application of federal law to questions of federal rights and liabilities arising from large-scale federal programs and transactions. 6/ The Supreme Court has held that one of the main purposes of that Act and Article VI, clause 2 of the Constitution (the Supremacy clause) "was to avoid

6/ 28 U.S.C. 1652 provides as follows:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. [Emphasis supplied.]

the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls" through application of state law. United States v. Allegheny County, 322 U.S. 174, 183.

In a long line of decisions, the Supreme Court has made it clear that the paramount federal interest in matters arising out of nationwide government programs and vast federal transactions compels the application of federal law. 7/

Thus, federal rather than state law has been applied to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447); to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (Clearfield Trust Co. v. United States, 318 U.S. 363); to determine whether particular machinery was the property of the United States or its private contractor for purposes of imposing state property taxes (United States v. Allegheny County, 322 U.S. 174); to determine the obligation of an endorser of a government check (National Metropolitan Bank v. United States, 323

7/ E.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 366; United States v. Allegheny County, 322 U.S. 174, 181-83; United States v. Standard Oil Co., 332 U.S. 301, 306.

U.S. 454); to adjudicate a third-party tortfeasor's responsibility for damages suffered by the United States as a result of an injury inflicted upon a serviceman (United States v. Standard Oil Co., 332 U.S. 301); to decide whether a liquidated damage clause in a government procurement contract was enforceable (Priebe & Sons v. United States, 332 U.S. 407); to interpret the nature of the rights and obligations created by bonds issued by the government. (Bank of America N.T. & S.A. v. Parnell, 352 U.S. 29); to the interpretation of a lease to which an agency of the United States was a party (United States v. 93.970 Acres, 360 U.S. 328); to settle the obligation of the Veterans' Administration after default under mortgages it had guaranteed (United States v. Shimer, 367 U.S. 374); and to fix the ownership of United States savings bonds after the death of one of the co-owners (Free v. Bland, 369 U.S. 663).

This Court has consistently applied that principle as well. For example, in this Court's decision in United States v. View Court Garden Apartments, 268 F. 2d 380, 382 (C.A. 9), certiorari denied, 361 U.S. 884, it was stated:

[W]e do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal.

The rule there set forth has been consistently followed by

this Court 8/, as well as by the other Courts of Appeals.9/
For, as the Supreme Court said in United States v. Allegheny
County, 322 U.S. at 183:

the validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

Thus it is plain that the SBA guaranty form 148 must be interpreted by the use of federal law. As we now show, the federal law requires a uniform rule rather than the adoption of varying state rules.

B. The Effective Administration of the Federal Program of Aid to Small Business Requires the Application of A Uniform Rule Rather Than the Adoption of Local Rules as the Federal Rule.

The determination that federal law governs an issue arising under a nationwide program usually requires the

8/ Liebman v. United States, 153 F. 2d 350, 352 (C.A. 9); United States v. Mathews, 244 F. 2d 626, 628 (C.A. 9); McKnight v. United States, 259 F. 2d 540 (C.A. 9); Bumb v. United States, 276 F. 2d 729 (C.A. 9); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F. 2d 640, 644 (C.A. 9); United States v. Queen's Court Apartments, Inc., 296 F. 2d 534 (C.A. 9); Woodbury v. United States, 313 F. 2d 291 (C.A. 9); Clark Investment Co. v. United States, 364 F. 2d 7 (C.A. 9).

9/ E.g., American Auto Insurance Co. v. United States, 269 F. 2d 406, 408 (C.A. 1); Penagaricano v. Allen Corp., 267 F. 2d 550 (C.A. 1); United States v. LeRoy Dyal Co., 186 F. 2d 460 (C.A. 3); Seabrook Farm v. C.C.C., 206 F. 2d 93 (C.A. 3); American Houses v. Schneider, 211 F. 2d 881 (C.A. 3); United States v. Flower Manor, Inc., 344 F. 2d 958 (C.A. 3); R.P. Farnsworth & Co. v. Electrical Supply Co., 112 F. 2d 150, 154 (C.A. 5), rehearing denied 113

(Continued)

application of a uniform rule rather than the adoption of principles of local law as the federal rule. For the adoption of local law tends to defeat the very purpose of the supremacy clause of the Rules of Decision Act -- the avoidance of "disparities, confusions and conflicts" following from the application of varied state law rules. See United States v. Allegheny County, 322 U.S. 174, 183.

The chief consideration upon which turns the determination of whether a uniform rule or local law is ultimately to be applied as the federal law is the need for uniformity of administration. Thus, in the Clearfield Trust decision, supra, the Supreme Court declared that except for the "occasional" instances in which there is no compelling need for uniformity, federal law must be applied to assure the uniform administration of the nationwide federal program or activity involved (318 U.S. at 367):

In our choice of the applicable federal rule we have occasionally selected state law. See Royal Indemnity Co. v. United States, supra, [313 U.S. 289, 296-297]. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity

9/ (Continued) F. 2d 111, certiorari denied, 311 U.S. 700; United States v. Sylacauga Properties, Inc., 323 F. 2d 487, 491 (C.A. 5); United States v. Taylor, 333 F. 2d 633, 637-638 (C.A. 5); United States v. Helz, 314 F. 2d 301, 303 (C.A. 6); United States v. Starks, 239 F. 2d 544 (C.A. 7); United States v. McCabe Co., 261 F. 2d 539 (C.A. 8); United States v. Chester Park Apts., Inc., 332 F. 2d 1, 3-4 (C.A. 8); certiorari denied 379 U.S. 901; Southwest Engineering Co. v. United States, 341 F. 2d 998, 1000 (C.A. 8); certiorari denied 382 U.S. 819; Southwest Engine Co. v. United States, 375 F. 2d 106, 107 (C.A. 8).

in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. * * *.

1. The SBA Program

The SBA program clearly requires a uniform federal rule for the interpretation of contracts of guaranty of this nature. The lending authority conferred upon SBA by the Small Business Act of 1953 10/ is part of a large-scale, nationwide congressional program for the assistance and protection of the country's small business concerns.

In creating the SBA in 1953, Congress expressly noted that the security and economic well-being of the Nation depended on the development and encouragement of small business enterprise. Sec. 202, 67 Stat. 232; 15 U.S.C. 631. The SBA was created to assist small business concerns when such concerns were unable to obtain financial assistance at reasonable rates from normal financial sources. Indeed, while the SBA is empowered to make loans to small business concerns either for designated capital expenditures or for specified types of working capital, 15 U.S.C. 636(a), it may not extend such financial assistance unless such assistance is not available elsewhere on reasonable terms. 15 U.S.C. 636(a)(1). Although the SBA is to make loans which

10/ After several amendments, not here relevant, the Act was re-enacted in 1958, 72 Stat. 384, 15 U.S.C. 631-651. All U.S. Code references are for convenience given to the current edition of the code.

are not commercially available, and thus perhaps not as well secured as would be the case for a commercial loan, 11/ Congress has required the SBA to take such security "as reasonably to assure repayment." 15 U.S.C. 636(a)(7). Thus the SBA was created by Congress in order to fill a need which ordinary commercial sources could not supply, but was directed to safeguard the taxpayers' money as well as possible consistent with its intended function. In order to accomplish that beneficent purpose, SBA utilizes a series of printed forms throughout the country, for its transactions, so that it may obtain both speed and certainty in its program.

2. The Facts of This Case.

In this instance, the facts of the case demonstrate the need for a uniform rule. The guaranty was executed on SBA Form No. 148, a printed form in use nationwide by guarantors under the extensive SBA program. 12/ The mobility

11/ Were the loan to be secured as adequately as would be commercially demanded, the assistance would be available commercially, and the SBA could not make the loan. 15 U.S.C. 636(a)(1).

12/ SBA uses three such printed guaranty forms - Nos. 148, 148A, and 148B - in order to reflect the varying participation possible in making the loans.

of those affected by the SBA notes (which are also on a printed form) and guarantees in most cases is shown by the fact that the Austads could not be found in Arizona at the time of suit, and had to be reached in California, while creditors were as far away as Texas. In many cases, of course, the principal does business in several jurisdictions, and the guarantors may be found in an even greater number of jurisdictions for service. No purpose would be served by leaving the interpretation of a guaranty to the choice of law rules of the state in which service is finally obtained. Nor would there be any purpose in having 50 possible interpretations of a uniform federal form utilized to secure federal monies paid out under constitutional and statutory authority.

For these reasons, under federal law a uniform federal rule must be adopted for the interpretation of the rights and liabilities of parties to this uniform, widely utilized, federal contract. 13/ Clearfield Trust Co. v. United States, 318 U.S. 363, 367; Free v. Bland, 369 U.S. 663, 668; United States v. View Court Garden Apartments, Inc., 268 F. 2d 380, 382 (C.A. 9) certiorari denied, 361 U.S. 884; Clark Investment Co. v. United States, 364 F. 2d 7, 9; United States v.

13/ The precedent set by this Court in Bumb v. United States, 276 F. 2d 729 (C.A. 9) in determining that federal law adopts state law in some instances as to the acquisition of various right against others has recently been followed by the Supreme Court in United States v. Yazell, 382 U.S. 341. As this Court has pointed out in Clark Investment Co. v. United States, 364 F. 2d 7, 9 (C.A. 9), however, Yazell does not apply to a case such as this where a single, nationwide, form must be interpreted. See also United States v. Carson, 372 F. 2d 429 (C.A. 6).

Chester Park Apartments, Inc., 332 F. 2d 1 (C.A. 8), certiorari denied 379 U.S. 901.

There would be no purpose served by adopting state law for the interpretation of "a nationwide act of the Federal Government, emanating in a single form from a single source," United States v. Yazell, 382 U.S. 341, 348, especially when there could be no individual negotiation as to the terms of the printed guarantees. See United States v. View Court Garden Apartments, Inc., 268 F. 2d 380 (C.A. 9), certiorari denied, 361 U.S. 884, cited with approval in Yazell, supra.

II. THE UNIFORM FEDERAL LAW TO BE APPLIED
TO THIS GUARANTY IN NATIONWIDE USE
PRECLUDES THE ASSERTION OF THE DEFENSES
WHICH APPELLANTS NOW SEEK TO RAISE.

In their brief to this Court, appellants raise three defenses to this action to enforce their unconditional guaranty of payment. The short of the matter is that each of these defenses, if they be defenses to such a guaranty, which is doubtful, was specifically waived in the guaranty itself. Federal law, in common with the general common law, allows such waivers, as we show below.

A. The Defense of Failure of SBA to Sue
On Demand Was Waived By The Appellants
By the Terms of Their Guaranty.

Appellants contend that they were released from their unconditional guaranty of payment by the failure of SBA to

bring suit within 60 days after demand, 14/ as required by Arizona Rev. Stat. §§ 12-1641, 12-1646. The short answer to this, of course, is that they specifically agreed that:

The undersigned hereby grants to SBA full power, in its uncontrolled discretion and without notice to the undersigned * * * to deal in any manner with the Liabilities and the collateral, including * * * the following powers:

(a) to modify or otherwise change any terms of all or any part of the Liabilities * * * to grant any * * * indulgence with respect thereto * * * (b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities * * * (e) In the event of the non-payment when due * * * of any of the Liabilities * * * to realize on the collateral or any part thereof * * * by foreclosure or otherwise, or to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper * * *.

The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against SBA by reason of any action SBA may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due * * * the undersigned, immediately upon the written demand of SBA, will pay to SBA the amount due and unpaid by the Debtor as aforesaid, in like

14/ For the purpose of this discussion, the allegations that an effective demand under Arizona law was made by plaintiff must be taken as true, as a result of the posture of the case. In fact, there is considerable question whether suit could have brought within the meaning of the Arizona statute, since the property was involved in litigation and the amounts due were still uncertain. Cf. Prescott Nat. Bk. v. Head, 11 Ariz. 213, 90 P. 328.

manner as if such amount constituted the direct and primary obligation of the undersigned. SBA shall not be required, prior to any such demand on, or payment by, the undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

(R. 21).

Thus, in the contract of guaranty they executed in order to obtain the SBA loan for their company, appellants gave SBA the power to grant any indulgence to or enter into an agreement of forbearance with the company and the power to forbear from realizing on the collateral, all as SBA in its discretion should deem proper. They agreed that their obligations as guarantors should not be affected nor should they have any rights against SBA by reason of SBA's exercise of any of the powers so granted. And they contracted that SBA should not be required to pursue or exhaust any of its rights or remedies against the debtor or the collateral before proceeding against them as guarantors.

Plainly, then, appellants have waived any right they might otherwise have had to require SBA to bring suit against the debtor and any rights which might accrue as a result of failure of SBA to pursue the debtor. Indeed, under common law, a creditor loses no rights against a surety or guarantor of payment merely as a result of failure to bring suit. Restatement of Security, § 130. Nor, "since the surety may pay the claim of the creditor and himself

proceed against the principal for exoneration in advance of payment (§ 112), the creditor's non-action generally affords no equitable basis for a claim of discharge by the surety." Id., comment (a). Even a binding contract between the creditor and the principal to extend the time of payment, which would normally discharge the surety, does not discharge him if he has agreed in his surety contract that this may be done, as appellants did here. Restatement of Security, § 129, comment (b).

Assuming that appellants did gain a right to demand suit by SBA as a result of the Arizona statutes, however, that right was clearly waived in the contract of guaranty. Such a right is not rendered non-waivable as a matter of public policy, for, as the First Circuit held long ago in a case on all fours with this one, "no reason can be suggested for sustaining any such proposition." Continental & Commercial Nat. Bank of Chicago v. Cobb, 200 Fed. 511 (C.A. 1). ^{15/} Thus as a matter of federal as well as common law, the defense here asserted has been waived. The Cobb case is dispositive.

B. The Defense of Laches Is Not Applicable Here.

The essence of a defense of laches is an unreasonable delay. That defense is not applicable here for two reasons.

^{15/} See also 38 C.J.S. Guaranty § 61(b), p. 122; Stearns, Law of Suretyship (5th Ed.) § 6.33, p. 157-158.

First, appellants misconceive the application of this defense, in their attempt to raise it to defeat an action at law on an unconditional guaranty of payment. Delay of a creditor is a defense only to a guarantor of collection, not to a guarantor of payment. Restatement of Security, § 130, see pp. 17, 18, supra. Since appellants unconditionally guaranteed payment of the debt (R. 21), they cannot here raise a defense of delay. 16/ And even if such a defense were otherwise available to them it is plain that it has been waived in the guaranty. For, as noted, supra, they expressly gave SBA the power, with respect to the debtor, "to grant any * * * indulgence" and "to enter into any agreement of forbearance"; and with respect to the collateral, "to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper." And they agreed that the exercise of these powers would not release them as guarantors. Appellants cannot now be heard to renounce their own contract.

Second, a defense of laches is simply not available against the United States. This suit, as demonstrated above, is an attempt to reclaim for the treasury monies lent by an agency of the United States in the fulfillment of a statutory mandate. Appellants' contention that laches may apply to "proprietary" functions of the government is mistaken in conceiving the SBA to be "proprietary", and, in any event, overlooks controlling authority. For, as the Supreme Court

16/ See also Stearns, Law of Suretyship, (5th Ed.) § 6.35.

has stated, Federal Land Bank v. Bismarck Co., 364 U.S.

95, 102:

The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

And, as the Court said in answer to a similar contention:

Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383.

Thus, in a case arising out of claims on FHA loans, which is not distinguishable from this case, the Court said:

It is well settled that the United States is not barred by state statutes of limitations or subject to the defense of laches in enforcing its rights.

United States v. Summerlin, 310 U.S. 414, 416; See Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 351.

Thus, even if laches were a relevant defense to a claim on a guarantee of payment, which it is not, it could not apply here. 17/

17/ In 1966, Congress passed a six year statute of limitation on the government's enforcement of claims generally. 80 Stat. 304, 28 U.S.C.A. 2415. The delay here is less than six years. Indeed, by the terms of the statute, the six year period does not begin to run on claims which accrued prior to passage until July 18, 1966. 28 U.S.C.A. 2415(g).

C. The Defense of Willful Impairment of Security Is Not Available.

The "willful impairment of security" alleged is specified (Appellants' Br. pp. 3, 13-14) as merely the delay in bringing this suit. Appellants, by this simple variation in terminology, seek to resuscitate the defense of laches, which does not exist under this type of guaranty and which they have waived in any event. This they may not do. United States v. Houff, 202 F. Supp. 471 (W.D. Va.), affirmed 312 F. 2d 6; United States v. Basil's Family Supermarket, Inc., 259 F. Supp. 139 (S.D. N.Y.). Cf. United States v. Newton Livestock Auction Market, Inc., 336 F. 2d 673 (C.A. 10). These cases, construing this contract of guarantee, make it absolutely clear that there is nothing here alleged which could defeat the recovery granted by the district court. The Houff case is directly in point. Noting that the "willful failure to act" clause of the guaranty applied to actual physical damage to the collateral rather than loss of value merely through delay, 202 F. Supp. 471, 479, 480, that court said:

In other words there is no claim that the SBA intentionally sold the goods so that they would not bring their full value but rather that it intended to sell as it did sell and that the result of such sale was that, irrespective of intent as to getting full value, the goods did not in fact bring their full value.

I believe, however, that the word willfully as used in the act refers to an intent to bring about the deterioration of the property. As said in Hazle v. Southern Pac. Co., 9 Cir., 173 F. 431.

'A "willful" Act is one that is done knowingly and purposely, with the direct object in view of injuring another'

And no such intent is now charged.

Thus it is plain that the district court correctly determined that none of appellants' alleged defenses could defeat the action on the guaranty. 18/

CONCLUSION

For the above stated reasons, the decision of the court below should be affirmed.

CARL EARDLEY,
Acting Assistant Attorney General

WILLIAM P. COPPLE,
United States Attorney,

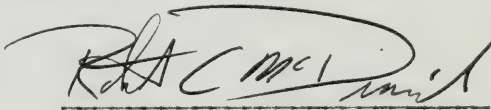
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18/ Even if Arizona law governed this case, which it does not, we have found, and appellants cite, no authority for the proposition that Arizona law, in opposition to the general common law rule, makes the waiver of the defenses now asserted void as against public policy. Cf. 38 C.J.S. Guaranty § 61(b), p. 122; Continental & Commercial Nat. Bank of Chicago v. Cobb, 200 Fed. 511 (C.A. 1).

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read 'RAC McDiarmid', is written over a horizontal line.

ROBERT C. McDIARMID,
Attorney for Appellee,
Department of Justice,
Washington, D. C. 20530.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNY R. AUSTAD and DOROTHY
AUSTAD, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20,876

APPELLANTS' REPLY BRIEF

FILED

AUG 11 1967

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AUG 17 1967

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PRELIMINARY STATEMENT

Appellants are in receipt of Brief for the Appellee and briefly respond to its argument under II C at pages 21 and 22 thereof captioned "The Defense of Willful Impairment of Security is not Available".

Appellants have argued that the District Court erred as a matter of law in holding that the Appellants were not released on their written guaranty by Appellee's wilful destruction of the security (Appellants' Opening Brief pp. 4, 5, 13-15). Under the written guaranty between the Appellants and the S.B.A. the Appellants would be released from their obligations as guarantors if the S.B.A. had caused a deterioration to the security by its wilful act or wilful failure to act (CTR 21). Appellants raised this affirmative defense in their Amended Answer (CTR 63, 64).

If it appears from the pleadings and other papers in the record that the S.B.A. may have destroyed the security by its wilful act or wilful failure to act, then factual issues are raised by this affirmative defense which would render improper the Entry of Judgment on the Pleadings, or alternatively a Summary Judgment.

II

FACTUAL ISSUES WERE RAISED BY APPELLANTS' AMENDED ANSWER WHICH RENDERED IMPROPER A JUDGMENT ON THE PLEADINGS

Appellee in its Brief argues that the defense of wilful impairment of security is not available to the Appellants, stating that the "wilful impairment of security" alleged (Appellants' Brief, pp. 3, 13-14) is merely the delay in bringing the suit (Brief of Appellee, pp. 21-22). However, the "wilful impairment of security" alleged by Appellants in their Amended Answer amounted in fact to a claim that the Appellee had wilfully failed to file suit for the purpose of causing the value of the security to be greatly diminished. Appellants' Amended Answer reads in pertinent part (CTR 63-64):

"... plaintiff is estopped to recover on the written guarantee because of an unconscionable delay in bringing this action . . . which delay was wilful and greatly diminished the value of the security" (underscoring added)

In the Houff case relied upon by Appellee (United States v. Houff [W.D.Va] 202 F Supp. 471, cited at page 21 of Appellee's Brief) similar language was used in raising this wilful-impairment of-security defense:

"The plaintiff 'by its wilful acts and its wilful failure to act . . . so managed and disposed of said collateral as to cause it to deteriorate in value . . .'"

The Court construed this language to mean that the S.B.A. had



made a deliberate attempt to sell the property at less than its full value. Counsel for Appellants however denied that they intended any such construction. All that they intended was that the S.B.A. did what it did in connection with the sale of the property not with the result. The Court stated in its opinion at page 479 of 202 F Supp:

"On the first hearing on the motion for summary judgment I construed the allegation of wilfulness as meaning to imply a deliberate attempt that the sale should be so made that the property should bring less than its full value. And while I thought it was extremely improbable that the Guarantors could do so, I thought they should have an opportunity to prove this allegation. In the argument on the renewed motion for summary judgment, counsel for the Guarantors stated that my construction of what they meant by wilful was not what they meant in their pleading and stated that, on the contrary, they had used the word wilfully as meaning that the S.B.A. did what it did in the way of advertising the sale intentionally and therefore wilfully in that sense and that, whether they intended the result or not, the result was that the collateral did not bring its full value.

In other words there is no claim that the S.B.A. intentionally sold the goods so that they would not bring their full value but rather that it intended to sell as it did sell and that the result of such sale was that, irrespective of intent as to getting full value, the goods did not in fact bring their full value." (underscoring supplied)

The Appellants in the instant case have not said, as the appellants did in Houff, that all they intended by the language in their Amended Answer was that S.B.A. did what it did in failing to file suit. The language of Appellants' Amended Answer must be construed as it was in the first instance in Houff to mean that S.B.A. delayed in bringing this action for the purpose of

diminishing the value of the security. While this may be open to some question, nevertheless if it raises an issue or issues of fact, these cannot be resolved upon a motion for Judgment on the Pleadings but only after trial.

Appellants submit that three factual issues were raised by their Amended Answer (CTR 63-64) which were not properly determined in the District Court upon Appellee's Motion for Judgment on the Pleadings:

- (1) Did Appellee wilfully delay in filing this action;
- (2) Did Appellee's wilful delay in filing this action greatly diminish the value of the security; and
- (3) Did Appellee wilfully delay in filing this action for the purpose of diminishing the value of the security.

III

FACTUAL ISSUES WERE RAISED BY APPELLANTS'
LETTER TO THE S.B.A. DATED SEPTEMBER 19,
1961 WHICH WOULD RENDER IMPROPER A
SUMMARY JUDGMENT

In addition to their Amended Answer, supra, Appellants attached to their Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings (CTR 65-66) a letter from the Appellant J. R. Austad to the Appellee S.B.A. dated September 19, 1961 (CTR 67). This letter was not excluded by the District Court and accordingly Appellee's Motion for Judgment on the Pleadings

may be considered as one for Summary Judgment under Rules 12(c) and 56 of the Federal Rules of Civil Procedure. Rule 12(c) reads in pertinent part:

"If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"

The letter from Appellant J. R. Austad to the S.B.A. dated September 19, 1961 reads in part as follows:

"It has come to my attention that even the Ducommun took possession of the property under their second mortgage and subject to the first mortgage (S.B.A.) that to date only interest payments have been made.

It would appear to me that a company as large as the Ducommun who is leasing out the entire plant to two firms, would certainly be in a position to do much better than that even from the income of the rentals. I feel that in this respect S.B.A. is not protecting their interest by allowing Ducommun to use all of the facilities, allow them to run down and still not make the mortgage payments . . ."
(underscoring supplied)

Appellant's letter (CTR 67) clearly implies that the Appellee S.B.A. was permitting Ducommun, the lessee of the security, to "run down" said security and to continue as lessee by making interest payments only without making any mortgage payments. In short, S.B.A. was wilfully causing or permitting a deterioration of the security. No affidavit or other paper was filed by the Appellee disputing the statements contained in said letter.

Appellants submit that two additional factual issues were



raised by their letter of September 19, 1961 (CTR 67) which may not properly be determined by the District Court upon Appellee's Motion for Judgment on the Pleadings treated as a Motion for Summary Judgment:

- (1) Did Appellee wilfully deteriorate the security by failing to collect mortgage payments as prescribed in the mortgage, and
- (2) Did Appellee wilfully deteriorate the security by allowing it to "run down".

IV

CONCLUSION

A crucial issue presented in the District Court was whether or not the S.B.A. caused a deterioration in the collateral by its wilful act or failure to act, thereby releasing the Appellants under their written guaranty. Factual questions were raised by the pleadings and other papers in the record concerning this issue, and accordingly it could not properly be determined upon a Motion for Judgment on the Pleadings nor upon such a motion treated as a Motion for Summary Judgment, but only after trial.

For the above reasons and the reasons heretofore set forth in Appellants' Opening Brief, the decision of the Court below should be reversed and the action remanded for further

proceedings therein.

Dated, San Francisco, California,

August 11, 1967.

Respectfully submitted,

ARTHUR H. TIBBITS,

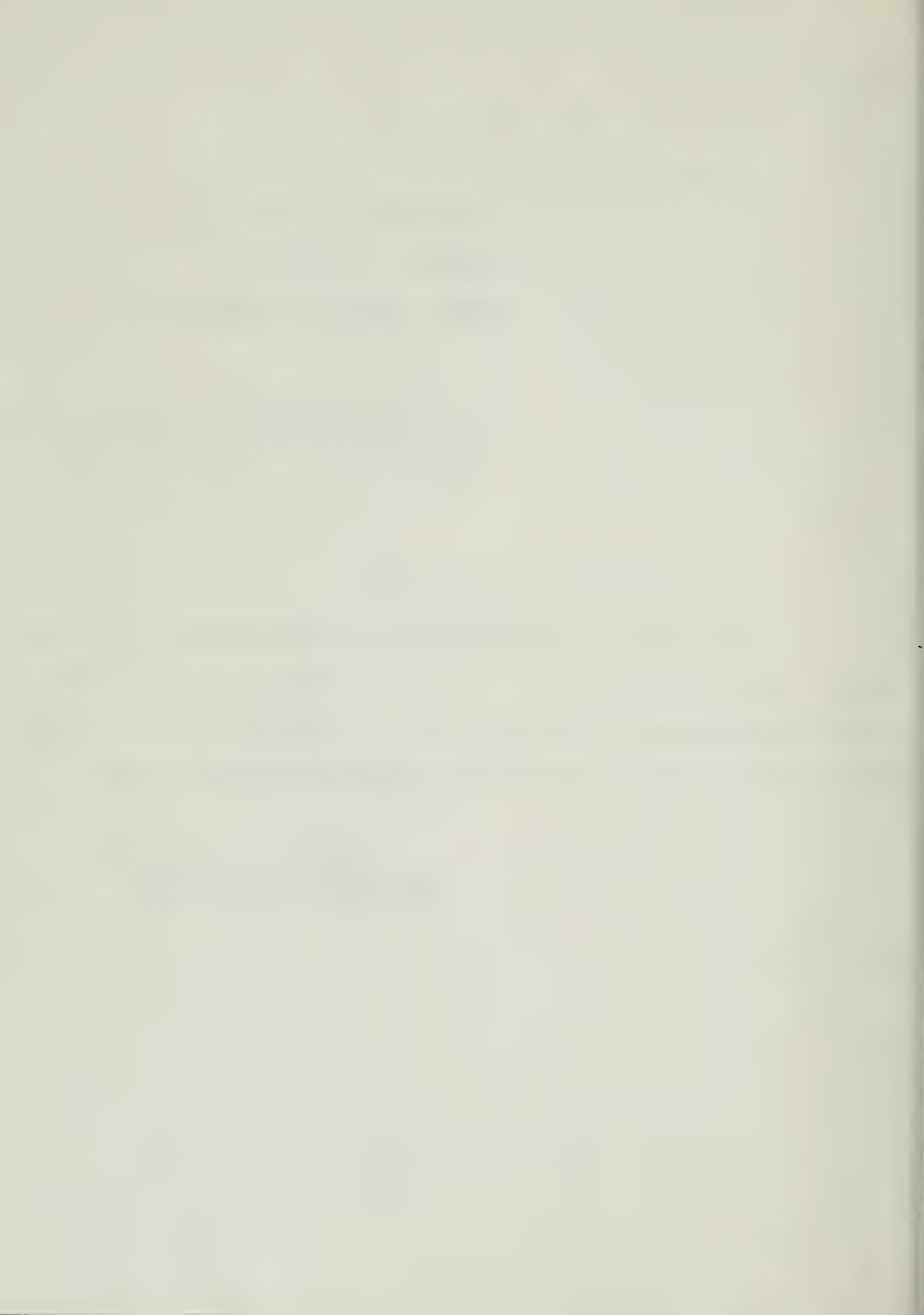
MESCH, MARQUEZ & ROTHSCHILD,

By Arthur H. Tibbits
Attorneys for Appellants Johnny R.
Austad and Dorothy Austad, his
wife.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arthur H. Tibbits
Attorney for Appellants



PROOF OF SERVICE

ARTHUR H. TIBBITS, ESQUIRE, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105, that he has served a copy of the attached Appellants' Reply Brief of Appellants Johnny R. Austad and Dorothy Austad, his wife, by placing a copy in an envelope addressed to the following person at his office address:

Robert C. McDiarmid, Esq.
Department of Justice
Washington, D.C. 20530

The envelope was then sealed and postage fully prepaid and on August 11, 1967, was deposited in the United States mail at San Francisco, California.

Executed on August 11, 1967, at San Francisco, California.

Arthur H. Tibbits



No. 20879

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. J. LISON COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the
National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

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No. 20879

IN THE

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R. J. LISON COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the
National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

This case is before the Court upon petition of R. J. Lison Company, Inc. pursuant to Section 10 (f) of the National Labor Relations Act, as amended, for review of an order of the National Labor Relations Board, issued March 29, 1966. The decision of the Board and order are reported at 157 NLRB No. 37. This court has jurisdiction of the proceedings as the unfair labor practices charged were alleged to have been engaged in at Burbank, California, where petitioner transacts its business. The National Relations Board in its answer to the Petition For Review admits the jurisdiction of this court. No jurisdictional issue is presented in this case. Section 10 (f) is found in 61 Stat. at page 143.

Statement of the Case.

The gravamen of the complaint filed in this case was that petitioner eliminated all overtime for, and later discharged, its employee, Stuart Taber, and discharged its employee, Curtis Reed, because each had engaged in union activity. Petitioner's answer controverted these allegations. Hearing was held in Los Angeles, California on October 5 and 6, 1965 before Howard Myer, Trial Examiner.

A Trial Examiner's Decision, dated December 29, 1965, sustained in full the allegations of the complaint, and among other things, recommended reinstatement with back pay for Stuart Taber and Curtis Reed. Petitioner filed exceptions to the decision and a brief in support thereof.

A Decision and Order of a three member panel of the Board, dated March 29, 1966, adopted the findings, conclusions and recommendations of the Trial Examiner, with one modification: contrary to the Trial Examiner, the panel found the evidence insufficient to support the finding petitioner had eliminated Taber's overtime work for a discriminatory reason. The Trial Examiner, in his decision, had found "that the elimination of Taber's overtime work at premium pay on and after October 30, 1964, was also violative of Section 8(a) (3) and (1) of the Act," but there was nothing in the record to show petitioner had any knowledge of Taber's union activity prior to the elimination of the overtime work.

Petitioner sells and services power sweepers, principally as a franchised dealer for Wayne Sweeping Equipment [TR 118].¹

¹TR refers to the Reporter's Transcript of the hearing.

As part of its service business, it provides maintenance service to about 1000 customers [TR 116, 198].

In the summer and early fall of 1964, its service work force consisted of four mechanics, one driver, one parts man and a service manager.

Curtis Reed was one of the mechanics. Stuart Taber was the parts man.

In July of 1964, its service facilities had been moved into a new building and Stuart Taber was assigned the additional task of watering a newly planted landscape. This required some overtime on his part.

On October 30, 1964 Peter McGrath, petitioner's general manager, told Taber to stop the watering and not to work any more overtime because the weather had cooled and the landscaping had become established [TR 127]. This eliminated Taber's overtime.

Pursuant to a consent election held by the Board, the union was certified as the bargaining agent for petitioner's service employees on November 13, 1964. The union had won the election, held on November 4, 1964, by a six out of six vote.

In about June of 1964, McGrath and Taber began having discussions about Taber's work load [TR 75]. Basically, Taber wanted to drop some "chain and flap" work he was doing [TR 77, 78, 79]. The last conversation took place sometime in October of 1964.

Taber claimed McGrath agreed he needed help. McGrath claimed he had said he would talk to Lison [TR 80] or Sheldrick [TR 94] about it. R. J. Lison was the president and Sheldrick the service manager for the company.

One of Taber's duties was to maintain inventory control cards. Petitioner stocks about 2500 different types of parts [TR 120]. There are few parts of which more than 5 are carried and some of which only 1 is carried [TR 121]. Inventory control cards were used in order to maintain an adequate supply of each part. A card was kept for each part showing the number presently in stock. The running balance on the card for each part was kept current by adding to it if a new part came into stock or subtracting from it if a part was used or sold.

Taber claimed he told McGrath he could not maintain the inventory control cards and McGrath did not dissent [TR 94]. McGrath claimed he simply told Taber to let the cards go for a while and catch up on them later [TR 148].

In the fall of 1964, petitioner's service business began to decline [TR 128]. On November 6, 1964 petitioner advised the union by letter that it would be necessary to terminate one man because of a lack of business. The union did not reply to the letter [TR 129, R-1].² In the middle of November, the truck driver, Holman Cluck, was terminated.

On December 2, 1964 petitioner advised the union by letter that it would be necessary to terminate another man because business continued to decline [TR 132, R-2]. Again, the union did not reply to the letter.

The decision to terminate a second employee was made in early December, however, Mr. Lison suggested

²R refers to Respondent's Exhibit.

waiting to terminate the man until after Christmas [TR 132].

The task of selecting the second man was left to Sheldrick [TR 177]. He suggested Curtis Reed, who was terminated on December 31, 1964.

On January 22, 1965 Lison discovered Taber had not been maintaining the inventory control cards or taken the September 30, 1964 inventory [TR 209]. In a very upset state he fired him.

General Counsel's position was that Taber's overtime was eliminated because of his union activity and that he was discharged for his union activity. As noted, the Trial Examiner sustained this position.

The Board panel adopted the Trial Examiner's findings, except it eliminated the finding Taber's overtime had been eliminated for an illegal purpose.

The initial question presented is whether there is substantial evidence on the record considered as a whole to support the findings that Stuart Taber and Curtis Reed were discharged because each had engaged in union activities.

Universal Camera Corporation v. NLRB, 340
U.S. 474, 71 S. Ct. 456.

A second question is whether the remedy ordered is proper, if such substantial evidence does exist.

Other questions are encompassed within the initial question.

Are the credibility resolutions supported by the evidence?

Did the Board err in considering and attaching significance to an expression of opinion allegedly made by R. J. Lison, which statement contained no threat of reprisal or force?

Did the Board err in considering and attaching significance to a statement made by Richard Sheldrick in jest?

Did the Board err in finding that petitioner advanced shifting reasons for the discharge of Reed?

Specification of Error.

Petitioner contends the Board erred in finding that Stuart Taber and Curtis Reed were discharged because each had engaged in union activity.

Petitioner contends the remedy ordered is not proper.

Petitioner contends the evidence does not support the credibility resolutions.

Petitioner contends the Board erred in considering and attaching significance to the statement allegedly made by R. J. Lison to Richard Lee.

Petitioner contends the Board erred in attaching significance to a statement made by Richard Sheldrick in jest.

Petitioner contends the Board erred in finding that petitioner advanced shifting reasons for the discharge of Reed.

Argument.

The Trial Examiner found that petitioner eliminated Taber's overtime on October 30, 1964 because of his union activity.

However, on that date, petitioner had no knowledge Taber was in any way involved with the union.

The election did not take place until November 4, 1964.

Sheldrick is alleged to have overheard Reed announce that a union meeting was to be held in Taber's house, but this was three weeks after the election.

Richard Lee (union organizer) was supposedly seen talking to Taber, but this was on January 22, 1965.

Lison is supposed to have said to Lee that except for Taber and Reed, bargaining would not be necessary, but this was in late December of 1964.

Each of these events took place after October 30, 1964.

True, the Board did not adopt this finding of the Trial Examiner, but it is mentioned at the outset as being indicative of the Trial Examiner's understanding of "substantial" evidence.

In *Universal Camera Corporation v. NLRB*, 340 U.S. 474, at page 488, the Supreme Court said:

Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is *substantial*, when viewed in the light that *the record in the entirety* furnishes, including the body of evidence opposed to the Board's view (Emphasis added).

Petitioner here contends there is no substantial evidence on the record as a whole to support the finding Taber was discharged for union activity. Proof that raises mere speculation, suspicion, surmise, guess or conjecture is not substantial evidence. *Local No. 3, United Packinghouse Workers, CIO v. NLRB*, 210 F. 2d 325 (8th Cir. 1954).

Marshalling all of the evidence on the discharges of Reed and Taber, we find that General Counsel presented evidence as follows:

1. On November 4, 1964 six men out of a six man unit, which included Taber and Reed, voted for the union.
2. Two days prior the the election, McGrath read a speech to the employees [TR 152-153, R-4].
3. About three weeks after the election, Sheldrick made a comment to Reed about a picket sign [TR 29].
4. About three weeks after the election, Reed, with-in hearing of Sheldrick, announced there would be a union meeting at Taber's house [TR 29].
5. In late December of 1964, Lison told Lee they would not be bargaining except for Reed and Taber [Tr. 12].
6. Sheldrick saw Lee talking to Taber on January 22, 1965 [Tr 17].
7. Reed was terminated on December 31, 1964 and Taber on January 22, 1965.

This is the sum and substance of General Counsel's evidence that petitioner discharged two of its employees with an unlawful intent. Basically, all that it infers is

that petitioner knew Reed and Taber supported the union and that they were discharged.

It is submitted the Board panel erred in finding petitioner had violated the Act on the basis of this meager evidence. The General Counsel had the affirmative duty to produce substantial evidence that the discharges were unlawfully motivated. All that was produced was evidence that raised suspicion and called for speculation. See *NLRB v. Rickel Bros. Inc.*, 290 F. 2d 611, 3rd Cir. (1961) for a case similar to this.

Actually, under Section 8(c) of the Act, the Board panel erred in even considering McGrath's speech and the comment Lison allegedly made to Lee in late December of 1964. See *NLRB v. Mt. Vernon Telephone Corporation*, 352 F. 2d 977 (6th Cir. 1965) where at page 979, the court said:

The National Labor Relations Act specifically provides that the expression of any views shall not be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. 29 U. S. C. Section 158(c). There is nothing in the above statements to indicate that they had the effect of coercion, threat of reprisal, or promise of benefit. They were made in the exercise of free speech and as such have no evidentiary value as an unfair labor practice. *NLRB v. Tennessee Coach Co.*, 191 F. 2d 546 (6th Cir. 1951).

The Board panel also erred in attaching significance to Sheldrick's statement to Reed which Reed, on cross-examination, admitted had been made in jest [TR 59].

On the other hand, there was substantial proof that petitioner did not discharge Taber and Reed for an unlawful reason.

First of all, there is no evidence at all of any union hostility on the part of the petitioner.

The union filed its petition for an election in early August of 1964 [TR 8].

Petitioner consented to the election [TR 8].

The election was held on November 4, 1964 [TR 8].

Between August 13 and November 4, petitioner's campaign consisted of one meeting at which McGrath read a speech [TR 151-152].

The concluding paragraph in that speech advised the employees they could "vote the way you want".

After the election, petitioner recognized and bargained with the union. There was no rejection of the union as the bargaining representative or of the bargaining process [TR 154].

Not a single factor is present in this case which the Board and the courts have always considered important in wrongful discharge cases. In fact, this writer has not been able to find a case where a discharge was held illegal where the only evidence was that the employer knew the employee supported the union.

The discharges did not take place immediately after the discovery of union activity as in many wrongful discharge cases.

Petitioner has never hired replacements for Reed and Taber [TR 161-162]. In *NLRB v. Mt. Vernon Tele-*

phone Corporation, 352 F. 2d 977 (6th Cir. 1965), at page 980, the court said:

There is substantial evidence to support respondent's position that the fourth man was not needed in the switchroom, and that operations were effectively carried on with only three men. With four men in the switchroom they were idle at times. Sanford's job was never refilled since his transfer to cable helper on July 25, 1962. This is strong evidence of the economic justification for his transfer.

There was no evidence of illegal interrogation of employees as in many wrongful discharge cases.

There was no evidence petitioner was hostile toward the union. See *NLRB v. Chicago Perforating Co.*, 346 F. 2d 233 (7th Cir. 1965), where at page 236, the court said:

On the contrary, while respondent evidently was surprised and perhaps displeased with the prospect of a union in its small plant, operating at a little profit, there is no suggestion of anti-union background, that it failed to acquiesce in the result and recognize the union as the bargaining agent for its employees.

There was no evidence petitioner departed from company policy regarding a reduction in work force as in many wrongful discharge cases.

There was no evidence Taber or Reed had been given recent wage increases. Reed had not received a raise for six months before his discharge [TR 228-230].

No employee had ever been threatened for his union activity as in almost every wrongful discharge case.

There was no evidence of unlawful surveillance of union activities as in many wrongful discharge cases.

Petitioner had no history of other unfair labor practices as in many wrongful discharge cases.

In short, none of the indicia of a wrongful discharge is present in this case.

In contrast to the speculative evidence adduced by General Counsel, petitioner presented positive, overbearing evidence that both Taber and Reed were discharged for cause.

A decision was made in early December to terminate a second man because of a decline in service business. Petitioner communicated that decision and the reason for it to the union on December 2, 1964 [TR 131-133, R 2]. At the hearing, no one questioned the assertion business had been declining.

It is submitted Reed's deportment as an employee justified his selection as the man to terminate. He was a poor employee.

He had been shaving on company time for about a year and a half [TR 34]. None of the other mechanics shaved on the job [TR 53].

He habitually was late for work [TR 48].

Other mechanics reported for work in their uniforms, but he changed into his on company time [TR 37-38].

There were complaints from customers about his work, and Sheldrick did speak to him about them [TR 52].

A customer had complained he was sleeping on the job, and Sheldrick did speak to him about it [TR 50-51].

Sheldrick, himself, had found him asleep on the job on two different occasions [TR 179-180].

There was ample cause for selecting Reed. Sheldrick, who made the selection, denied union activity entered into it [TR 181]. Lison believed Reed was not a strong union supporter because Reed had bragged about crossing a picket line [TR 215].

Taber's discharge was spontaneous. Taber did not deny he had failed to maintain the inventory control records. Lison believed he had neglected his job, became angry, and fired him.

The language of the court in *NLRB v. McGahey*, 233 F. 2d 405 (5th Cir. 1956), at page 412, is particularly appropriate in this case:

The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, naught remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second guess it or give it gentle guidance by over the shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but

one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. (Citations omitted).

Petitioner also attacks the crediting of testimony by the Trial Examiner, as adopted by the Board panel. See *NLRB v. Mount Vernon Telephone Corporation*, 352 F. 2d 977 (6th Cir. 1965), at page 979:

It is clear that the crediting of a witness by a Trial Examiner is entitled to great weight by a reviewing court, but it is also true that the crediting is not conclusive on the court. The court may choose not to be bound if it believes that the crediting was improper.

The Trial Examiner consistently credited the witnesses for General Counsel and discredited those for petitioner, even though petitioner's evidence was in most instances of a positive nature and corroborated by other facts and circumstances.

For example, petitioner's evidence was that Reed was an unsatisfactory employee. Sheldrick was able to give specific instances of complaints he had received.

Robert Lopez, a member of the six-man unit, who substituted for Sheldrick during his vacation period, related he had received a complaint from a customer which he related to Reed [TR 220-221].

Reed himself acknowledged Sheldrick had spoken to him about customer complaints and sleeping on the job.

Reed was a biased witness because of his financial interest in the outcome of the hearing. The refusal to follow the Trial Examiner in crediting testimony where it conflicts with well-supported and obvious inferences

from the rest of the record is proper, particularly so where the testimony in question is given by an interested witness and relates to his own motives. *NLRB v. Pyne Molding Corporation*, 226 F. 2d 818 (8th Cir. 1955).

The Trial Examiner credited Reed's testimony in the face of his obvious attempts to misstate the evidence.

On direct examination, Reed testified he had a "conversation" with Sheldrick concerning the union and that Sheldrick told me that we "should get the right colored picket signs, so it wouldn't clash with the building if we went union" [TR 28-29].

On cross-examination, he admitted Sheldrick had made the statement in a joking manner [TR 50].

The Trial Examiner attached significance to the statement.

On direct examination, Reed testified union meetings were held at Taber's house, "across from the plant", intimating surveillance was possible.

On cross-examination, he admitted Taber's house was a block and a half from the plant [TR 45-46].

Reed testified he had received periodic raises during the period of his employment [TR 26].

In reality he had not received a raise for six months before he was discharged [TR 228-229].

Reed testified that Lison had told the employees in a speech they would be replaced if the union won the election [TR 56].

In fact, it was McGrath who read the speech and it contained no such threat [TR 60; R 4].

In spite of all of this overstepping, the Trial Examiner chose to credit Reed.

The Trial Examiner was not consistent in his reasons for crediting one witness and discrediting another. While Lee spoke with “candor” when he admitted he could not recall specific words [p. 3, lines 51-53 of Trial Examiner’s Decision] Sheldrick was made to look the buffoon when he could not recall a lot of details [p. 6, lines 1-10 of Trial Examiner’s Decision].

The Trial Examiner credited evidence which disclosed Reed had never been reprimanded [p. 4, lines 14-17 of Trial Examiner’s Decision]. Yet Reed himself admitted Sheldrick had spoken to him about customer complaints and sleeping on the job [TR 49-51, 52].

The Trial Examiner was not justified in placing significance on the fact Reed had not been told he would be discharged if the complaints continued. The Trial Examiner was not justified in eliminating from consideration Reed’s many shortcomings as an employee. See *NLRB v. Rickel Bros. Inc.*, 290 F. 2d 611 (3rd Cir. 1961).

The Trial Examiner attached much significance to the claim of Taber that he had too much work to do. He ignored the testimony of Sheldrick and McGrath that he did not. He ignored the uncontroverted evidence that Taber was doing less shipping in October of 1964 than when he first went to work [TR 89; R 6].

In any event, whether Taber had more work to do than he could handle, and whether McGrath promised him assistance, are not pertinent. That was management’s business.

Again, the Trial Examiner credited evidence about which General Counsel’s witnesses did not testify. He found McGrath had promised Taber to do something

about his work load [p. 8, line 16 of Trial Examiner's Decision]. McGrath denied any such promise and when Taber was discharged, he did not accuse McGrath of *agreeing* to anything. His words to McGrath were, Didn't I *ask* you for an assistant [TR 70].

The Trial Examiner misconstrued the evidence in finding that petitioner advanced various reasons for Reeds' discharge [p. 9, lines 24-34 of Trial Examiner's Decision]. Petitioner advanced only one reason for the discharge of Reed, an economic one. That reason was clearly spelled out in its letter of December 2, 1964 to the union. It was adhered to during the hearing and in the brief. The fact that more than one reason was stated for selecting Reed as the man to terminate does not mean petitioner changed its position.

The Trial Examiner placed great reliance upon Lison's alleged statement to Lee during a bargaining session that "if Curt Reed and Steward Taber hadn't been around why, there wouldn't be any union. If it wasn't for them, why, we wouldn't be sitting here today".

As noted, that statement of opinion is not coercive or threatening and cannot be considered as evidence of an unfair labor practice.

But over and above that, Lison denied making the statement.

In support of Lison's denial, it does not seem likely that, if an employer had already decided to discharge an employee for union activity, he would blurt out something to expose his illegal plan to the union representative before the discharge. Such a statement is totally inconsistent with petitioner's acceptance of the union and its lack of hostility toward the union.

The Trial Examiner credited Lee and discredited Lison on this point on the basis of demeanor. Lison, he said, “gave the impression that he was studiously attempting to conform his testimony to what he thought was to the best interest of” petitioner, while Lee gave the impression he was “a person who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was actually said on that occasion” [p. 3, footnote 8 of Trial Examiner’s Decision].

This indictment of Lison was based upon his utterance of three words, “I did not”. He was asked if he had ever made such statement and he answered “I did not” [TR 214].

It is submitted such a simple, direct statement does not lend itself to the critical analysis accorded it by the Trial Examiner.

The Trial Examiner implied Lison’s denial was not worthy of belief because McGrath did not corroborate it, but the absence of cumulative evidence alone does not discredit sworn testimony.

Petitioner submits the credibility resolutions of a Trial Examiner are unworthy when based upon mere form and “boilerplate” language.

A Trial Examiner’s findings are not to be given more weight than they deserve in reason and in the light of judicial experience. *NLRB v. Florida Citrus Cannery Cooperative*, 288 F. 2d 630 (5th Cir. 1961).³ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496.

³Case reviewed and remanded by Supreme Court. Enforcement again denied in case reported in 311 F 2d 541.

It has been the experience of this writer that it is a rare occasion when in the trial of a contested matter, it is so obvious that one side is speaking the truth and the other is not.

Cited below are three other decisions in other cases of the Trial Examiner given at or about the time of the decision in this case:

Transonic, A Division of Genisco Technology,
Case No. 31 C.A. 23;

United Nuclear Corporation, Case No. 28 CA
1138;

*The Boy's Market, Inc. and Food Employers
Council,* Case No. 21 CA 5891.

In each of these cases is found the same “boilerplate” language regarding the credibility of witnesses. See Appendix.

Petitioner submits credibility resolutions based upon mere form and meaningless language are unworthy.

The Board undoubtedly has access to all of the decisions rendered by this Trial Examiner within a reasonable period of time near the issuance of his decision in this case. Petitioner does not, but petitioner challenges the Board to state in its reply brief how many decisions were rendered by the Trial Examiner during such a period, and in how many of those did the Trial Examiner find that one side's witnesses “studiously attempted to conform their testimony to what they felt to be their best interest”, while, on the other hand, the other side's witnesses “appeared to be careful with the truth and meticulous in not enlarging their testimony beyond their memory of the facts”.

Conclusion.

Petitioner submits there is not substantial evidence to support the findings that Curtis Reed and Stuart Taber were discharged for union activity or support and that the record, as a whole, discloses cause for the discharge of each of them.

Petitioner requests this court to make and enter its decree setting aside the Decision and Order of Respondent and dismissing Respondent's cross-petition for enforcement.

Respectfully submitted,

SWEENEY, COZY & FOYE,

By M. J. DIEDERICH,

Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

M. J. DIEDERICH



APPENDIX.

Appendix Page 1

Page 13, Trial Examiner's Decision
in The Boys Markets, Inc.

(Howard Myers), dated June 18, 1965

See Brackets

TXD-(SF)-78-65

Freed testified that in the forepart of September 1963, Gus De Silva and Madray called upon her regarding the discharge of Neal Nutzman, a Crenshaw store snack bar operator and a Local 770 member, that after the Nutman had been disposed of Gus De Silva and Madray "mentioned that they had given some cards to the employees and talked to them, but they did not tell me that they had them signed and all of the people signed them"; and that at no time prior to April, 1964, did McKinstry tell her that Local 770 had received signed authorization cards from any snack bar employee.

In the light of the undersigned's observation of the conduct and deportment of Freed, Madray, McKinstry, and Gus De Silva while they were on the witness stand, and after a very carefully scrutiny of their testimony, the undersigned finds that Madray's, McKinstry's, and Gus De Silva's versions of their respective conversations with Freed, as epitomized above, to be substantially in accord with the facts. This finding is based mainly, but not entirely, on the fact that Madray, McKinstry, and Gus De Silva each impressed the undersigned as being one who is careful with the truth and meticulous in not enlarging his or her testimony beyond his or her actual memory of what was said and what was done. On the other hand, Freed gave the undersigned

the distinct impression that she was studiously attempting to conform her testimony to what she considered to be in the best interests of Boy's and the other respondents.^{15]}

Under date of January 8, the Joint Board wrote Boy's that it represented "the majority of the unrepresented employees employed in the snack bar of The Boy's Markets, Inc., located within Southern California. The letter concluded with a request for recognition as the collective bargaining representative of the employees in the above-mentioned unit and for a meeting for the purpose of negotiating a bargaining contract.

After the receipt of the forementioned Joint Board letter, Boy's hired the accounting firm of J. R. McKnight & Associates, to conduct a card check.

Under date of January 14, 1964, Winston R. Grein of the McKnight firm wrote Boy's as follows:¹⁶

In Response to your request I arrived at your office at 10:00 a.m. this morning to perform a card check. You gave me a sheet of paper with twenty one names typed thereon. Mr. Meister of the Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, gave me a group of cards which represented requests by certain of your employees to join his union and designate it as their collective bargaining representative.

¹⁵This is not to say that at times Madray, McKinstry, and Gus De Silva were not confused on certain matters or that there were not variations in their objectivity and convincingness. But it also should be noted that the candor with which each of them admitted, during their searching examinations, that they could not be certain as to dates, times, or the exact words used, only serves to add credence to what a careful study of their testimony shows what they honestly believed to be the facts.

¹⁶A copy of this letter was forwarded to Meister of the Culinary Workers.

Appendix, Page 2

Page 14, Trial Examiner's Decision
in United Nuclear Corporation
(Howard Myers) dated Jan. 18, 1966

See Brackets

. . . speech between the two of us. He'd say "Come on, Smitty, tell me something." "Hell, the only thing I know is coming from the miners, you let me know what is happening now." And that was just about a standard procedure with us as to conversations we got into. Again referring to the fact that you thought that I said there would be no transferring if the union came in, the Company had just got through transferring a bunch of men during that time from the Sandstone Mine to the Rare Metals Mine. They transferred union men there, and in the event of the close down, I still don't believe, I'll say in nineteen or twenty minutes, I honestly didn't believe that if there was a union in there that they wouldn't transfer the men.

Q. You say at that time the Company had just got through transferring some men to the Rare Metals Mine? A. Well, in the vicinity of that, yes. Transferred the men from the Sandstone Mine to the Rare Metals Mine.

Q. Rare Metal Mine is also the same mine known as the San Mateo Mine? A. Yes.

In the light of the undersigned's observation of Lilly, Fowler, Smith, Dominguez, Lassiter, Cummings, Gallegos, and Velarde, while each was on the witness stand and after a very careful examination of the entire record, the undersigned finds that Lassiter's, Cummings', Gallegos', Dominguez' and Velarde's versions

of their respective talks with Lilly, Fowler and Smith, to be substantially in accord with what was said. [This finding is based mainly, but not entirely, on the fact that Lilly, Fowler, and Smith each gave the undersigned the distinct impression that he was studiously attempting to conform his testimony to what he thought to be the best interest of the Respondent. On the other hand, Lassiter, Cummings, Gallegos, Dominguez, and Velarde each particularly impressed the undersigned as being one who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was said on the foregoing occasions.²¹]

On July 31, the election was held among the 135 Sandstone and Cliffside unit employees. Of the 125 employees voting, 81 cast ballots in favor of the Union and 44 against.

On August 10, the Regional Director, for and on behalf of the Board, certified the Union as the collective bargaining representative of all the employees in the agreed to appropriate unit.

On August 3, Respondent's counsel telephoned Frantz and suggested that a date be fixed for the holding of a negotiating meeting as soon as convenient. Frantz replied he wanted to wait for the Board's certification before entering into negotiations. The parties finally agreed to meet on August 17.

²¹This is not to say that at times Lassiter, Cummings, Gallegos, Dominguez and Velarde were not confused on certain matters or that there were no variations in their objectivity and convincingness. But it should be noted the candor with which each of them admitted that they could not be certain as to dates, times or the exact words used, only serves to add credence to what a careful study of their testimony shows as to what they honestly believed to be the facts.

Appendix, Page 3

Page 15, Trial Examiners Decision
in Transonic, A Division
of Genisco (Howard Myers), dated
December 21, 1965.

See Brackets

Q. During that meeting, which was addressed by yourself and Mr. Van de Water, did you make any statement to the employees about work or work speed? A. Well, yes. We told the employees that we expected to receive for eight hours' pay eight hours of work.

Q. Did you say any more than that? A. No.

Covie Webb testified that on the same day Porter and Van de Water had addressed the employees' meeting, referred to immediately above, she asked Porter, "How long this pressure going to exist that we were working under" and that Porter replied, "As long as negotiations exist with the union." Porter testified that he had a conversation with Webb immediately after the aforesaid meeting; that he could not recall telling Webb that he intended "to keep the pressure on, . . . as long as the union was around"; and that he never "told anybody, any employee, any supervisor, or otherwise, there would be pressure kept on until the union matter was resolved."

In the light of the undersigned's observation at the hearing of the conduct and deportment of Webb and Porter and after a very careful scrutiny of the entire record, the undersigned finds that Webb's version as to what was said to her by Porter on August 18, to be substantially in accord with the facts. [This finding is

based mainly, but not entirely, on the fact that Porter gave the undersigned the distinct impression that he was studiously attempting to conform his testimony to what he believed to be the best interest of Respondent. On the other hand, Webb impressed the undersigned as being a person who is careful with the truth and meticulous in not enlarging her testimony beyond her actual memory of what was said on that occasion.]

On October 23, two days after the commencement of the strike, Respondent began notifying the strikers that they had been permanently replaced. In fact, 23 strikers were so notified prior to actually being replaced.

On November 9, the parties met in negotiations with Duncan. When Simon stated that the Union had never changed its position with respect to its demands, Downs, to quote from Downs' credible and uncontradicted testimony, "reminded Mr. Simon that he was present with Mr. Meuhle . . . when we told them at one point . . . , if Jamieson was willing to sign the agreement outlining the same provisions as [in] the agreement between the Leach Company²⁸ and the Machinists Union . . . we could wrap up the contract real quick" for the Leach contract "included the wage rates, which was what Mr. Meuhle had been trying to get us to look at this particular time." In response to Downs' remarks, Simon admitted remembering the meeting, remembering the discussion, and where the meeting took place. When Downs commented that Respondent "had always argued their desire to be competitive, and saying that [Respondent's proposed] wage rates had to exist . . . they never had told us who. . . ."

²⁸Leach is a Los Angeles based concern with which the Union has a collective bargaining contract.

**In the United States Court of Appeals
for the Ninth Circuit**

R. J. LISON COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Petition for Review and Cross-Application for
Enforcement of an Order of the National Labor
Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,879

R. J. LISON COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Petition for Review and Cross-Application for
Enforcement of an Order of the National Labor
Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon petition of R. J. Lison Company, Inc. to review an order (R. 34-37)¹ of the National Labor Relations Board issued on

¹References to the pleadings reproduced as Volume I, Pleadings are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

March 29, 1966. In its answer the Board has requested enforcement of its order, which is reported at 157 NLRB No. 101. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),² the unfair labor practices having occurred in Burbank, California, where petitioner is engaged in the sale and servicing of commercial power sweeping machines. No jurisdictional issue is presented.

I. Counterstatement of the Case

Briefly, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employees Curtis Reed and Stewart Taber because of their union activities.³ The evidence upon which these findings rest is summarized below.

A. *The advent of the Union*

Two of respondent's six employees, Stewart Taber and Curtis Reed, contacted a union official in early August 1964⁴ (R. 14; Tr. 67). Authorization cards were sent to the two employees, who distributed them to the other workers (R. 15; Tr. 67). As a result of Taber's and Reed's effort, all six employees authorized the Union to represent them and, on August 13,

² Pertinent statutory provisions are reprinted, *infra*, pp. 15-17.

³ Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as the "Union") (R. 10).

⁴ All dates hereafter are 1964 unless otherwise specified.

the Union filed a petition for an election (R. 11). An agreement for a consent election was approved by the Board's Regional Director on October 26 and an election was held on October 30, which the Union won by a unanimous vote. (R. 11). Accordingly, on November 13, the Union was certified as the exclusive bargaining representative of petitioner's employees (*ibid.*).

On December 21, Richard Lee, a union official, conferred with Company President Robert Lison, his wife, and General Manager Peter McGrath (R. 11; Tr. 116, 208). Lee presented a proposed contract and the parties engaged in general discussion of its provisions (R. 11; Tr. 13). While discussing one of the contract terms, possibly the Union's proposal on hourly wages for mechanics, Lison remarked that he didn't consider most of his employees to be "full-fledged mechanics" since the previous job experience of one was restricted to working in a pet shop, another was only kept—or hired—because of Lison's desire to help him with his personal financial problems, and that ". . . Curt Reed was probably their only qualified mechanic" (R. 12; Tr. 13, 15). Later, during the same discussion, Lison turned to McGrath and said: "If Curt Reed and Stewart Taber hadn't been around, why, there wouldn't be any union, [we] wouldn't be sitting [here] today" (R. 11; Tr. 13). No agreement was reached on the contract.

B. The discharges of Reed and Taber

On the afternoon of Thursday, December 31, Dick Sheldrick, the plant service manager, handed Curtis

Reed his paycheck and told him it was his "last check from this company" (R. 12; Tr. 30). Reed, who had received neither notice nor other warning, was surprised and angered (R. 12; Tr. 30). When Reed asked why he was being discharged, Sheldrick answered that he had been "late too many times" (R. 12; Tr. 31).

Shortly thereafter, Reed met General Manager McGrath in the plant parking lot and asked why he had been fired (R. 13; Tr. 31). McGrath replied that it was because of Reed's inability "to do the work" (R. 13; Tr. 32). Reed asked if he might have a written statement to that effect. McGrath agreed and went to the plant office to type the statement (R. 13; Tr. 32). Meanwhile Reed, with Taber's assistance, gathered his tools and returned to the parking lot. McGrath came back to the lot and explained that he had talked to Lison, who refused to provide a statement setting forth the reason for Reed's discharge (R. 13; Tr. 32).

Later, on January 4, 1965, Union Organizer Lee telephoned McGrath and asked why Reed had been discharged. McGrath told him that Reed was discharged "because [he] was shaving on company time" (R. 13; Tr. 14).⁵

On January 22, 1965, Union Organizer Lee entered Company premises and engaged in conversation with

⁵ Still later, at the unfair labor practice hearing, McGrath testified that he and Plant Service Manager Sheldrick had conferred in late November to decide which of the employees should be laid off in view of the seasonal decline in work. According to McGrath, Sheldrick advised that Reed be discharged "because we had complaints about his work" (R. 13; Tr. 140).

Stewart Taber, who, as mentioned above, had been one of the chief union proponents during the earlier campaign (R. 16; Tr. 17). Sheldrick, standing 8 to 10 feet away, observed this contact. Leaving Taber, Lee went to McGrath's office where he again encountered Sheldrick (R. 16; Tr. 18-19). Lee asked to speak to McGrath and was received by him in an inner office (R. 16; Tr. 19). Lee informed McGrath, among other things, that "[t]he boys [are] thinking seriously of a strike situation if we [don't] get together and negotiate a contract" (R. 16; Tr. 19).

Less than an hour later, McGrath went to the parts department and asked Taber if he had been keeping accurate inventory control records (R. 16; Tr. 68).⁶

⁶ Taber, who was hired in January 1963, was senior to all other employees (R. 14; Tr. 53-54, 66). During his employment, both his remuneration and duties had steadily increased. Thus, he received five pay increases totaling nearly \$100 per month, exclusive of overtime, and was charged with shop duties as a mechanic, responsibility for parts and inventory, and, through the summer of 1964, caring for trees and shrubs at a newly acquired company building (R. 15; Tr. 66, 72). He repeatedly complained to McGrath that his shop duties were not compatible with the inventory control job—"paperwork and grease do not mix"—and that he needed an assistant to maintain inventory bins and records, and to keep the mechanics from circumventing the supply system (R. 15; Tr. 77-80, 83-84, 156). McGrath agreed on several occasions that corrective measures should be taken, but no changes occurred (R. 15; Tr. 78, 79-80). In late October, Taber was told by McGrath that there was no further necessity for the groundskeeping job which Taber had been doing after working hours, adding that no further overtime would be authorized (R. 16; Tr. 81). Because of the failure to eliminate his shop duties, coupled with the fact that no helper had been assigned him and the added pressure created by the Company's

Taber replied that he had not and reminded McGrath that he had repeatedly informed him of the impossibility of keeping the records current without a helper (R. 16; Tr. 68, 147). McGrath took the inventory control cards and told Taber that henceforth they would be kept in the office (R. 16; Tr. 165).

According to Lison, McGrath showed him the cards at about 1:30 that afternoon (R. 16; Tr. 217). McGrath said that upon realizing that Taber had not maintained the inventory control cards, he "was shocked" and when he told Lison, "he was very upset . . . felt that [Taber] should be dismissed" (R. 16; Tr. 147, 150).

About 2:30 that afternoon, McGrath and Lison walked into the parts department. Lison handed Taber a check and told him he was discharged (R. 16; Tr. 69). Taber, who had no prior warning, asked why, and Lison replied that the inventory control cards had not been kept properly (R. 16; Tr. 70, 150, 216). Taber pointed to McGrath and said, "didn't I ask you for an assistant to give me a hand with inventory control, or give me a hand in the parts department generally?" (R. 16; Tr. 70). McGrath admitted this, but added that Taber "had plenty of time in the last few months to catch all this back inventory control up" (R. 17; Tr. 70, 211, 218). Lison then told Taber to "pack your personal belongings and

acquisition of three new dealerships and the withdrawal of authorization for overtime, Taber fell behind in his inventory control (R. 16; Tr. 82). He warned McGrath of the situation and was told to "let [it] go and catch up when you can" (R. 16; Tr. 82, 148).

get out, and never come back on the premises again” (R. 17; Tr. 70, 211, 218).

II. The Board's Conclusions and Order

The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Reed and Taber because of their activity on behalf of the Union.⁷

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights protected under Section 7 of the Act. Affirmatively, the Board's order directs the Company to reinstate Curtis Reed and Stewart Taber to their former or equivalent positions and make them whole for any loss of wages they may have suffered because of Company discrimination against them, and to post the usual notices (R. 19-21, 33).

ARGUMENT

The Company Violated Section 8(a)(3) and (1) of the Act by Discharging Taber and Reed Because of Their Union Activity

As the Trial Examiner concluded, “this case presents the comparatively rare situation where the reci-

⁷ The Board did not agree with its Trial Examiner's conclusion that the Company's elimination of Taber's overtime work at premium pay on and after October 30 violated the Act. Accordingly, that portion of the complaint was dismissed (R. 31-32).

tation of the facts leading up to the discharges vividly reveals their discriminatory character" (R. 17). Thus Reed and Taber, the most senior in point of service of the Company's employees, received regular raises and were highly regarded by management until they became the spearhead of the Union's campaign to organize their fellows. Derelictions of duty, long countenanced by the Company—in fact not previously regarded as serious enough even to merit mention⁸—suddenly became grounds for immediate discharge, without warning and, in Taber's case, in angry words.

Thus, Lison's last statement to Taber, "get out, and never come back on the premises again" (Tr. 70) is both angry and unexplained. Taber's dereliction, for which he was ostensibly discharged, was failure to keep current the inventory control cards. However,

⁸ Lison testified that, to his knowledge, Taber had *never* been reprimanded for anything until the day of his discharge (Tr. 216). Reed, regarded by Lison as his "only qualified mechanic" had not been warned concerning any of the multitude of transgressions serially described by Sheldrick as reasons for discharge. Thus, Sheldrick stated that:

(1) he had received complaint from some 30 or 35 customers about Reed's poor workmanship and/or the fact that on some occasions Reed would go to a customer's establishment and merely, "stand around and stay there ten minutes, possibly, and leave"; that of the said 30 or 35 customers who complained about Reed, he could recall only (a) early in 1964, Prudential Insurance Company requested that Reed not be dispatched to its establishment because Reed "didn't do any work," (b) Simi Drive-In complained, early in the summer of 1964, that Reed came to its place of business, had the regular monthly service slip signed and then left without doing any work, (c) the firm of Tarter, Webster & Johnson complained,

it is admitted that he repeatedly informed McGrath of the fact that he could not keep, and had not kept, the cards up to date (Tr. 70, 77-80, 83-84, 211, 218, 156, 148). Certainly it could not come as a surprise to McGrath that the cards were in the condition which allegedly "shocked" him, and ostensibly angered Lison. Moreover, McGrath's "shock" is no less incredible than Lison's anger, for the inventory system itself was so unimportant to Lison that after Taber's discharge none was kept for over two months (Tr. 103). In view of these facts the Board was amply warranted in concluding that Taber's "unsatisfactory work became unsurmountable in [Lison's] eyes when Lee mentioned to McGrath [that morning] that the employees were thinking about striking the plant" (R. 18). Accordingly, Lison's angry dismissal of Taber is revealed as being directly attributable to Taber's known identification with the Union and its plans. As the Court of Appeals for the Fifth Circuit stated in similar circumstances (*Gullett Gin Co. v. N.L.R.B.*, 179 F. 2d 499, 501-502, modified with respect to remedy, 340 U.S. 361):

during early summer of 1964, that Reed did not do any work when he came to its establishment, and (d) Safeco complained that Reed stopped at its place of business, slept for two hours and then left; and (2) that during the summer of 1964, he found Reed asleep on two separate occasions in the plant during working hours. (R. 13; Tr. 176, 180, 187, 191).

Nevertheless. Reed in fact had been treated with no small degree of indulgence. For instance, upon being discovered asleep on the job on two occasions, his supervisor merely admonished him to "punch out and go home * * * if he wanted to sleep" (Tr. 181). Sheldrick, the supervisor, did not report either sleeping incident to McGrath or Lison (*ibid.*).

While a discharge in caprice or anger is not in and of itself a violation of the Act, if that caprice or anger arises out of, or may be reasonably attributed to, resentment against employees for pressing their rights under the Act, the Act specifically makes such discharges unfair labor practices.

Accord: *N.L.R.B. v. Moss Planing Mill Co.*, 206 F. 2d 557, 559 (C.A. 4); *N.L.R.B. v. Jackson Tile Mfg. Co.*, 282 F. 2d 90, 95 (C.A. 5).

Similarly, in Reed's case, it is not only a reasonable, but a nearly inescapable, conclusion that the Company's management was bent upon correcting, *nunc pro tunc*, the circumstances which underlay Lison's lament: "If Curt Reed and Stewart Taber hadn't been around, why, there wouldn't be any union . . ." (Tr. 13). Nor is such strategy without redeeming value since, in a unit composed of six employees, the loss of the most militant one-third would certainly interfere with plans for concerted employee action in connection with bargaining. Other reasons cited by the employer were properly rejected as pretextuous.

Thus, Sheldrick testified that he noticed in November that "work was falling off . . . as it normally does at that time of year" (Tr. 175). There is no evidence that this yearly slump has ever required discharges—or even layoffs—in previous years.⁹ Nonetheless, according to Sheldrick he went to Lison and recommended that the employee second in seniority, the "only qualified" mechanic in the Company's em-

⁹ In November 1964, one truck driver was laid off (R. 14, n. 11; Tr. 131, 174) A replacement was hired in July 1965 (Tr. 138).

ploy, be discharged because of ancient derelictions many of which, at the time of their occurrence, had not been regarded as serious enough to warrant mention.¹⁰

In short, the reasons advanced by Company officials for Reed's discharge are numerous, shifting and, in large part, unsupported. Initially the Company's position was that Reed was discharged for excessive absenteeism (Tr. 31). A short while later, Reed was told that his "inability to . . . do the work" caused his discharge (Tr. 31-32).¹¹ Less than a week later, in answer to questioning by a union official, McGrath said that Reed had been discharged for shaving on company time (Tr. 14).¹² Still later, at the hearing,

¹⁰ Sheldrick stated that he "reprimanded" Reed in connection with the Prudential complaint but did not mention it to either McGrath or Lison, and did not remember whether or not he had dispatched Reed to the complaining company thereafter; that he could not recall mentioning the Simi complaint to Reed; that he "believed" he had talked to Reed about the Safeco complaint, but Reed had denied it; and that he could not recall even talking to Reed about the Tarter, Webster & Johnson complaint (*supra*, p. 8, n. 8; Tr. 188-189, 192, 193, 196). He also testified with regard to finding Reed asleep on two occasions (*supra*, p. 8, n. 8); that he did not mention even the possibility of discharge the first time he spoke to Reed and did not remember speaking to him at all on the second occasion (Tr. 194).

¹¹ Ten days earlier Lison had spoken of Reed as his "only qualified mechanic" (Tr. 15).

¹² Credited testimony reveals that Reed had consistently shaved during working hours, and had been observed without comment by both McGrath and Sheldrick (Tr. 35). Shortly after the election Lison told Reed and Taber (who also shaved

the Company took the position that Reed's discharge had been the result of economic necessity coupled with numerous customer complaints (*supra*, p. 8, n.8). Even assuming, *arguendo*, that each of the multiple malfeasances ascribed to Reed are factually true, "the existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 449 (C.A. 9), quoting *Wells, Inc. v. N.L.R.B.*, 162 F. 2d 457, 459-460 (C.A. 9). It is unremarkable that the Board's Examiner, faced with these multiple and shifting reasons advanced by management spokesmen for the discharge of Reed, found them to be "persuasive indications that antiunion reasons, rather than the reasons advanced by [company officials], accounted for the action taken against him" (R. 17).¹³

on the job) that they were to discontinue this practice on pain of discharge (Tr. 34). Reed never again shaved on working time (*ibid.*).

¹³ In thus resolving questions of credibility and concluding that the reasons given by the Company for Reed's discharge were pretexts only, the Trial Examiner, at one point, employed language in a formulation similar—but not identical—to that which he has previously used in other cases. Citing this similarity, the Company terms the formulation "boilerplate" and suggests either bias and prejudice, or lack of diligence—it is unclear which is relied upon (Co. br. p. 19). Initially, it is axiomatic that in cases such as this, in which abundant evidence, none of it inherently incredible, supports the Board's findings, it remains for the Examiner and the Board, and not the Court, to resolve questions of credibility. *N.L.R.B. v. Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 469 (C.A. 9), and cases cited n. 10 thereat. Specifically, here, as in *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*, at p. 470, the Examiner found the stated

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for review be dismissed and that the Board's order be enforced in full.

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October 1966.

motives to be false, inferred from the surrounding circumstances that there was another motive which the employer desired to conceal and that it was an unlawful one. In thus concluding, he found it necessary to resolve questions concerning the credibility of conflicting testimony given by the various parties. That the Examiner found certain significant characteristics in the witnesses' demeanor and modes of expression which he had observed in other witnesses in other cases, and which he described in similar language, is scarcely surprising and clearly inadequate as a basis for reversal of his findings. We submit that the Company's challenge to the trier of facts' necessary resolution of questions of credibility rests primarily upon "nothing more" than "the feeling * * * not uncommon for one against whom decision has gone" that the trier, "be he baseball umpire, trial judge or hearing officer, is biased." *N.L.R.B. v. Lewisburg Chair & Furniture Co.*, 230 F. 2d 155, 156 (C.A. 3).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or

transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of re-

lief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 20879

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. J. LISON COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the
National Labor Relations Board.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The Board places great reliance upon the following arguments:

1. Reed and Taber were senior in point of service of the Company's employees, received regular raises and were highly regarded by management until they became the spearhead of the Union's campaign to organize their fellows.

The fact is that Reed had not received a raise for six months prior to his discharge. [TR 228-230].

There is no evidence that either had received a recent wage increase.

There is no evidence they were "highly regarded" until they became the "spearhead" of the Union's campaign. It was Sheldrick who made the decision to terminate Reed and Sheldrick testified of many instances

which indicated he did not hold Reed in high regard. [TR 34, 48, 37, 52, 179].

There is no evidence Respondent was aware they were "spearheading" an organizational drive. After all, between the two of them, they only had to obtain four authorization cards.

In fact, Reed was considered to be a poor union supporter by Lison because he had bragged about crossing a picket line. [TR 215].

There is no evidence Respondent suddenly turned on these two employees. The election was held November 4, 1964. At that time Respondent could conclude that Reed and Taber had voted for the union. The discharges did not take place until about 60 days later.

2. Derelictions of duty, long countenanced by the Company, suddenly became grounds for immediate discharge.

The fact is that Reed was not discharged because he was derelict in his duties. Reed was terminated because service business fell off in the fall of 1964. [TR 132, R-2]. Neither Taber nor Reed denied the Company's claim that service business was falling off in the fall of 1964. Reed was selected as the man to terminate because he was considered by Sheldrick to be the least efficient employee.

Taber's failure to maintain the inventory control cards was not known until the date of his discharge. Taber had been told to let the cards go and catch up on them when he could. [TR 148]. But he had had adequate time to catch up and failed to do so. [TR 70, 211, 218].

3. The inventory control system was so unimportant that after Taber's discharge none was kept for over two months.

The fact is that during this two month period the Company was setting up a new inventory control system to be handled in the office. The cards necessary for the new system were at the printers for six weeks. When the printer delivered the cards, over 5,000 of them had to be prepared. It was little wonder two months elapsed before the inventory control system was operating again. [TR 101-102].

4. Lison was angry when he notified Taber of his discharge.

There is not a shred of evidence that Lison's anger arose out of resentment for union activities. The evidence is that he was angry because Taber had not been doing the job he was paid to do.

5. The Company gave shifting reasons for Reed's discharge.

The fact is that only one reason was ever advanced for Reed's termination. That reason was documented almost a month before the termination when the Company advised the Union it would be necessary to terminate another man for economic reasons. [TR 132, R-2].

The fact that many reasons existed for selecting Reed as the man to terminate only adds to the Company's defense.

The fact remains that none of the indicia of an illegal discharge are present in this case.

In every wrongful discharge case which has come to the attention of this writer, indeed, in every case cited by the Board in its brief, there has been some conduct on the part of the employer to show an illegal motive, *i.e.*, surveillance, threats, promises of benefits, or other unfair labor practices.

Not one of these commonly recognized factors indicating illegal motive is present in this case.

No employee was ever threatened. In fact, they were assured they were free to vote for the union if they wished. [TR 151-152].

The terminations did not follow the election immediately. Reed and Taber have never been replaced. There is no evidence of interrogation, surveillance, or union hostility.

On the contrary, the Company cooperated in the election and agreed to a consent election. The Company recognized the Union and bargained with it after the election. The Company has never rejected the union or the principle of collective bargaining.

Respondent submits this case is based entirely upon surmise and suspicion and is lacking in the quality of proof required to be produced and is very much like *Lozano Enterprises v. National Labor Relations Board*, 357 F. 2d 500 (1966-9th Circuit) in which this Court denied enforcement.

Respondent respectfully requests this Court to make and enter its decree setting aside the Decision and Order of Respondent and dismissing Respondent's cross-petition for enforcement.

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By M. J. DIEDERICH,
Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. J. DIEDERICH

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 12**

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20914

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 12

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondent on November 18, 1965, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*).¹ The Board's Decision

¹ The pertinent statutory provisions are reprinted, *infra*, pp. 21-24.

and Order (R. 18-31, 35-36)² are reported at 155 NLRB No. 89. This Court has jurisdiction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred in the port of North Bend-Coos Bay, Oregon.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(b)(2) and (1)(A) of the Act by refusing to dispatch three employees to longshore jobs and by barring them from the dispatch hall, because they engaged in a concerted protest against respondent's dispatching procedures. The facts upon which the Board based its findings are as follows:

The Pacific Maritime Association ("PMA") is an association of employers in the shipping and stevedoring industry which represents its members in collective bargaining with the International Longshoremen's and Warehousemen's Union ("ILWU") (R. 18; Tr. 7, 11, U. Ex. 2, p. 1, R. 14). ILWU is the bargaining agent of certain Pacific Coast longshoremen employed by the PMA companies (U. Ex. 2, p. 1). In 1961, PMA and ILWU entered into a five-year collective bargaining agreement (R. 20; U. Ex. 2, p. 1). The agreement provides that the "hiring

² References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's and the Union's exhibits are designated "G.C. Ex." and "U. Ex.", respectively.

and dispatching of all longshoremen shall be through halls operated jointly by [ILWU and PMA],” and that there “shall be one central dispatching hall in each of the [Pacific Coast] ports with such branch halls as shall be mutually agreed upon.” (U. Ex. 2, p. 42.) The agreement requires that the expense of operating the dispatch halls “shall be borne one-half by the local union and one-half by the Employers.” (R. 20; U. Ex. 2, p. 42, Tr. 144-145.) The agreement provides for the establishment of a Joint Port Labor Relations Committee (“Joint Committee”) in each port, composed of an equal number of ILWU and PMA representatives (R. 20; Tr. 135, U. Ex. 2, pp. 63-64). Under the terms of the agreement, the Joint Committees investigate and adjudicate grievances and direct the operation of the dispatch halls in their respective ports. Dispatchers are to be selected by the International “through elections.” (R. 20; U. Ex. 2, pp. 43, 64).

Local 12, ILWU, is the local affiliate in the Oregon Port of North Bend-Coos Bay (R. 20; Tr. 166). Bernard Warnken, Lee Thomas and Donald Wilson worked in this port as “casual” longshoremen, that is, as non-registered longshoremen who are dispatched to jobs when no registered longshoremen are available (R. 20; Tr. 15, 12). Casuals call the dispatch hall early each morning. A tape recording tells them the prospects for employment that day. If the recording offers encouragement, the casuals report to the dispatch hall. If sufficient work is available, the dispatcher chooses casuals from among those present and

all" (R. 21; Tr. 57, 105-108, 111). On October 7, the three grievants went to the Air Force base and complained to an officer that his men were taking their jobs (Tr. 57-58). On October 8, shortly after Thomas and Warnken arrived at the hall, Armstrong and Joe Jakovac, the relief dispatcher, came out of the dispatch office and walked up to where Warnken was talking to another casual. Jakovac asked Warnken where Thomas was. Thomas then walked up and Jakovac said, "I am going to have to ask you fellows to leave this hall. This is a private hall and we've got the right to ask anyone to leave here that we don't want" (R. 21; Tr. 111, 125-126, 137, 170-173). Thomas and Warnken then started to leave and met Wilson coming in the side door (R. 22; Tr. 126, 112). They told him there was no "use going in, because we just got run out" by Jakovac and Armstrong (R. 22; Tr. 126, 58-59). The three men left the hall, but returned later that day, when Thomas went in to talk to Jakovac. Thomas asked Jakovac "just who give you the authority to tell us to stay out of this hall?" Jakovac said, "Me." Thomas asked, "You, yourself"? and Jakovac replied, "Yes, nobody else—me. Now * * * get out and stay out. I'm not going to argue with you" (R. 22; Tr. 127-128).

The same day, Wilson protested to Ferguson by telephone. Ferguson telephoned the hall, called Wilson back, and agreed to give the complainants some definite information by the following Tuesday, October 13. Ferguson told Wilson not to "take any drastic action until then," and Wilson agreed. That Tues-

day the grievants "waited all day [at Wilson's home] and never heard a word" (R. 23; Tr. 59-60). The following day, October 14, they resumed picketing the hall and continued to picket until October 20, when they filed an unfair labor practice charge with the Board (R. 21; G.C. Ex. 1(a), 60, 71-72, 113, 128). At a meeting of the Joint Committee on October 21, the charges came to the attention of the members, whereupon the employer representatives announced that they would have nothing further to do with the matter. The Committee has made no disposition of the grievance. (R. 24; Tr. 72, 91, 140.)

On or about November 13, all three returned to the hall seeking employment (R. 23; Tr. 122-123, 113). Between that time and March 23, 1965, Warnken reported to the hall some 90 mornings without being dispatched to a single job (R. 23; Tr. 113-114, 104, 121, 60-61). Wilson reported for about 50 days without being dispatched, and finally obtained other employment on February 16, 1965 (R. 23; Tr. 60-64, 78-79, 51-52). Thomas reported regularly between November 13 and December 4 or 5 but received no work (R. 23; Tr. 130, 60-61).

Approximately 400 casuals obtained work through the hall during 1964 (R. 20; Tr. 17, 22). During the first three quarters of the year the 14 highest earning casuals in 1964 had wages averaging \$3,344.00 (R. 23; G.C. Ex. 2(d)-2(q), Tr. 15). During the same period Wilson earned \$2,870.00, which was more than three of the top 14 had earned up to that point (R. 23; G.C. Ex. 2(b), 2(k), 2(f), 2(n)). Warnken earned \$2,526.00 during this pe-

riod and Thomas earned \$2,053.00 (R. 23; G.C. Ex. 2(a), 2(c)). During the last quarter of 1964 the 14 high earners averaged \$1,194.00 in wages, or slightly higher than their average quarterly earnings for the first three quarters of the year (R. 23; G.C. Ex. 2(d)-2(q)). The fourth-quarter earnings of the charging parties were zero (R. 23; G.C. Ex. 2(a)-2(c), Tr. 14-15). 1965 wages for the high earnings group, through March 8, averaged more than \$930.00; earnings for Warnken and Wilson during this same period were zero, although Wilson reported to the hall until February 16, and Warnken reported regularly throughout this entire period (R. 24; G.C. Ex. 2(a)-2(q), Tr. 113-114, 63-64).

II. The Board's conclusions and order

On the basis of these facts, the Board found that Local 12, by and through the acts of the dispatchers, refused to refer the charging parties to available longshore jobs beginning on October 5, 1964, and subsequently barred them from the dispatch hall, because they had challenged the dispatching procedures in use at the hall, in violation of Section 8(b)(2) and (1)(A) of the Act (R. 29, 26-27). The Board ordered respondent to cease and desist from the unfair labor practices found and to make the employees whole for loss of pay suffered by reason of respondent's unlawful conduct (R. 30). The order also requires that respondent post the usual notices and notify the Joint Committee and the North Bend-Coos Bay dispatchers that the charging parties will have "full use of this

hiring hall without discrimination in connection with their dispatch to employment.” (R. 30).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD’S FINDING THAT THE UNION REFUSED TO REFER WARNKEN, WILSON AND THOMAS FOR EMPLOYMENT, AND EXCLUDED THEM FROM THE HIRING HALL, BECAUSE THEY HAD PROTESTED THE HIRING PROCEDURES IN USE AT THE HALL, IN VIOLATION OF SECTION 8(b)(2) AND (1)(A) OF THE ACT.

Section 8(a)(3) of the Act makes it unlawful for an employer “by discrimination in regard to hire * * * to encourage or discourage membership in any labor organization: * * *.” Under Section 8(b)(2) of the Act, it is an unfair labor practice for a union “to cause or attempt to cause an employer to discriminate against an employee in violation of [Section 8(a)(3)],” while Section 8(b)(1)(A) further forbids a labor organization “to restrain or coerce * * * employees in the exercise of rights guaranteed in Section 7 * * *”. Section 7 confers on the employee the right to engage in union activity and “other concerted activities for the purpose of * * * collective bargaining or other mutual aid or protection,” as well as the right to “refrain from any or all such activities * * *.”

It is settled law that a union violates Section 8(b)(2) and (1)(A) of the Act if, pursuant to an arrangement with an employer requiring union referral as a condition of employment, it refuses to refer

an applicant for employment in order to punish or retaliate against him for protesting the union's policies or questioning the official conduct of its agents. *N.L.R.B. v. International Longshoremen's and Warehousemen's Union, et al.*, 283 F. 2d 558, 560-563, 567 (C.A. 9); *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 734 (C.A. D.C.); *Brewers and Maltsters Local Union No. 6, IBT v. N.L.R.B.*, 301 F. 2d 216, 224 (C.A. 8); *N.L.R.B. v. H. K. Ferguson Co.*, 337 F. 2d 205, 207-208 (C.A. 5), cert. denied, 380 U.S. 912; *International Brotherhood of Teamsters v. N.L.R.B.*, 227 F. 2d 439 (C.A. 10), enforcing 108 NLRB 874; *N.L.R.B. v. Carpet, Linoleum, etc., Layers, etc.*, 213 F. 2d 49, 51-52 (C.A. 10); *N.L.R.B. v. Pacific Intermountain Express Co.*, 228 F. 2d 170, 173-174, 176 (C.A. 8). See also, *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 28-32, 39-42. A union which takes disciplinary action of this nature serves notice upon the employees that anyone who challenges the union's authority or questions the wisdom of its policies or otherwise opposes the union will find himself out of work. The necessary effect is to encourage each employee to support the union by becoming a member and remaining in good standing.³

The uncontradicted evidence establishes that the charging parties emphatically and repeatedly challenged as "unjust" and "highly irregular" the infor-

³ The Supreme Court held in *Radio Officers' Union v. N.L.R.B.*, *supra*, 347 U.S. at 39-42, that discrimination which encourages a member to remain in good standing with the union is "discrimination * * * to encourage * * * membership" within the meaning of Section 8(a) (3).

mal dispatching procedures employed by dispatchers Oldland and Jakovac. Between August and October 1964, they attacked those procedures in direct confrontations with the president of respondent and the Joint Port Labor Relations Committee, in a written statement of grievances submitted to the Joint Committee, in direct communications with members of the Committee, by picketing the dispatch hall on two separate occasions, and by filing unfair labor practice charges with the Board. Moreover, the evidence convincingly demonstrates that the dispatchers deliberately overlooked the protestants in referring casuals to jobs. The evidence is uncontradicted that all three of them were present in the hall seeking work on October 5, 6, and 7, 1964, when the dispatcher referred every other casual present and then recruited additional workers from the local taverns and a nearby Air Force installation. The dispatcher on duty, Joe Jakovac, had no explanation for their failure to obtain a referral on these occasions, although, at the hearing, he admitted he knew of their presence at the hall these mornings and did not controvert testimony by General Counsel's witnesses that the hall was emptied by requests for longshoremen and that he was forced to look elsewhere for casuals.

After their arrival the following day, October 8, Jakovac expelled them from the hall. When Thomas returned later in the day and asked Jakovac by what authority he had denied them access to the premises, Jakovac replied that the authority was "me" and that Thomas was to "get out and stay out." (R. 22, Tr.

128). Jakovac insisted that he ordered them out of the hall on October 8 because they had created a disturbance on the previous days, although he conceded that he was unaware of any such misconduct on the morning of the 8th. (Tr. 183, 185-186, 180). The record carries no suggestion that any of the charging parties was warned on the alleged previous occasions. According to Armstrong, president of Local 12, who was present, Jakovac simply walked up to Warnken and Thomas and asked them to leave, without so much as intimating that they were being expelled for disturbing the hall (Tr. 173).

The grievants did not enter the hall again until November 13 when an agent of the Board advised them that during his investigation of the unfair labor practice charges the Union had told him that the expulsion was for one day only (R. 23; Tr. 122, 128-129). They returned but were not rehired. Although they had been among the highest-earning casuals during the first three quarters of 1964, an earnings summary prepared by PMA shows that the protestants' earnings fell precipitately to zero for the period between late September and March 23, 1964, the date of the unfair labor practice hearing, while referrals of other casuals with comparable earnings continued at a slightly higher rate during the same fall and winter. (R. 23-24; G.C. Ex. 2, Tr. 13-15, 28.) Thomas was present in the hall seeking work regularly between November 13 and December 4 or 5 (R. 23; Tr. 130, 60-61); Wilson reported on some 50 mornings between November 13 and February 16, 1965 (R. 23; Tr. 63-64, 78-79, 51-52); Warnken reported on 90

occasions between November 13 and March 23, the date of the Board hearing (R. 23; 113-114, 104, 121, 60-61). The evidence is uncontradicted that casuals were dispatched to work during every weekly pay period between September 28 and the final pay period on the earnings summary (March 8, 1965), with the exception of the week ending November 23 (G.C. Ex. 2). Even Chief Dispatcher Oldland was unable to explain the failure of these men to obtain referrals during this period (R. 24; Tr. 161-162).⁴

On these facts, the Board reasonably found that the charging parties were deliberately bypassed in the hiring process and were expelled from the dispatch hall because they had vigorously challenged the hiring procedures in use at the hall. It is equally clear, moreover, that by filing a grievance and peacefully picketing the dispatch hall in order to defend their job opportunities against what they regarded as an arbitrary system of preferences, these men were en-

⁴ The earnings summary sets out the weekly wages of the 14 highest earning casuals during 1964. While it is true that Oldland maintained an informal list of 13 preferred casuals who owed their special status to their long use of the hall, and that most of the 14 top earners in 1964 were members of this preferred group, others among them (Anderson, Haverinen, Kuykendall, and until late in the year, Miller and Brock), had no special status. (R. 20, 23; Tr. 154, 163-165, G.C. Ex. 2(d)-2(q)) *All* of the top earners, including these five individuals, continued to earn substantial wages during the final quarter of 1964 and the first two months of 1965. (R. 24; G.C. Ex. 2(d)-2(q)). Thus, the Board properly rejected respondent's contention that the charging parties had no earnings during this period because longshore work was scarce (R. 24).

gaged in a legitimate concerted activity for their "mutual aid and protection," the exercise of which is clearly protected against union restraint and coercion by Sections 7 and 8(b)(1)(A). Compare, *Morrison-Knudsen Co., Inc. v. N.L.R.B.*, 358 F. 2d 411, 412-414 (C.A. 9).⁵

Thus, in *Brewers and Maltsters Local Union No. 6, IBT v. N.L.R.B.*, 301 F. 2d 216 (C.A. 8), three employees in a bargaining unit represented by a Brewers' local of the International Brotherhood of Teamsters wrote to monitors of the international charging the local leadership with "discrimination, favoritism, loss of wages to the writers and a seniority system giving unwarranted preferences," and demanding an investigation of these charges by the monitors. 301 F. 2d at 220. Shortly thereafter, as the Board found, the dominant official of the local, one Lewis, caused the employer to discharge one of the complainants. The Court upheld the Board's finding that Lewis caused the discharge in retaliation for the employee's part in the monitor letter, and the Court agreed with the Board's conclusion that this conduct violated Section 8(b)(2) and (1)(A) of the Act. See also, cases cited *supra*, p. 10.⁶

⁵ Parenthetically, Oldland admitted he had given preferences to some longshoremen's sons and long-time users of the hall; Jakovac conceded in his testimony that he lined up the casuals before selecting them for jobs, as charged by the grievants, although he did not comment upon their characterization of this procedure as personally degrading (R. 22; Tr. 154, 156-159, 182).

⁶ According to Jakovac, the complainants were expelled not for filing grievances or picketing but for creating a disturb-

Respondent contends, however, that it was not responsible for the unlawful operation of the dispatch hall because the hall was under the immediate control of the Joint Committee. We show below that the contention is without merit, since the evidence establishes that the dispatchers operated the hall as agents of respondent.

The 1961-1966 Agreement between PMA and ILWU provides that the "hiring and dispatching of all longshoremen shall be through halls maintained and operated jointly by [ILWU] and [PMA] in accordance with the provisions of Section 17." (U. Ex.

ance in the hall (Tr. 186, 182). His own testimony establishes, however, that what had disturbed him were the legitimate efforts of these men to enlist the support of other casuals in their campaign to persuade Jakovac to abandon his method of selecting casuals for referral. Thus Jakovac explained that he "couldn't really tell what was going on" on the morning of the 8th, but he knew that "there had been a period of time there for several days when these people had been walking around the hall and they were clustered up in bunches and were talking to other people and trying to start a strike against the hiring procedure; and they were pretty active for a period of time and they were in a sense disrupting the people there and the men at all times; and I know that they had, at times, told people to rush up to that [dispatch] window" and seek work on a "first come, first serve" basis, rather than submit to the line-up selection procedure which the grievants had challenged before the Joint Committee. (Tr. 180-182) The Trial Examiner properly found (R. 27) that Jakovac's own version of the events of October 8 constituted an admission that these men were ejected from the hall for protesting his hiring procedures, in violation of Section 8(b) (1) (A) of the Act, although the Board was entitled to find, as it did, that their exclusion was also in retaliation for their other concerted activities (R. 27).

2, p. 42.) Section 17 provides for the establishment of the Joint Port Labor Relations Committees, whose function it is to "maintain and operate the dispatching hall" under the rules and regulations set forth in the agreement (U. Ex. 2, p. 64). The Union's representatives on the Committees are to be chosen by the International (U. Ex. 2, pp. 63-64, 1). Neither the contract nor the ILWU constitution limits the power of the International to remove such representatives at will. Section 8.21 provides that the "personnel for each dispatching hall, with the exception of the Dispatchers, shall be * * * appointed by the Joint * * * Committees of the port." (U. Ex. 2, p. 43.) Dispatchers are to be selected "by the [ILWU] through elections * * *." (U. Ex. 2, pp. 43, 1.)

In the application of these provisions, however, it was respondent, Local 12, which appointed, from its own membership, the union representatives on the North Bend-Coos Bay Joint Committee (Tr. 136). Moreover, it was the local membership which elected the dispatchers themselves (R. 20; Tr. 157). Under the agreement, the Local underwrote one-half of the cost of operating the hall, while the International contributed no funds towards its operation (R. 20; Tr. 144, U. Ex. 2, p. 42). During the early stages of their protest, moreover, it was Armstrong, as president of respondent, whose assistance the grievants sought. (See Tr. 37-40, 100-102.) At one point, Armstrong informed the employees that the Joint Committee would hear their complaints, although at the appointed hour no representatives of the Joint Committee, the Local, or the International appeared.

Armstrong was present and remained silent on October 8 when Jakovac ordered Thomas and Warnken to leave the hall (R. 26; Tr. 125, 173). Cf. *N.L.R.B. v. International Longshoremen's, etc., Union, et al.*, 283 F. 2d 558, 567, n. 6 (C.A. 9).

Thus, the uncontradicted evidence establishes that the International and PMA prescribed in detail the powers and duties of the Joint Committee; that the International retained effective control of the union representatives by virtue of its power of appointment and removal; and that the International elected to share its responsibilities with the Local by delegating its power of appointment and permitting the Local to elect the dispatchers from its own membership. Nor is it surprising that the International would share its authority with the Local, since International headquarters are located some 400 miles away in San Francisco (Constitution, ILWU, Article II). The Local is obviously better able to appraise the performance of the union officials in its own port. Indeed, on at least three previous occasions when agency problems have arisen under the procedure in question, this Court has found that ILWU delegated this function to its locals despite the rights reserved to the International in its contract with PMA. See *N.L.R.B. v. International Longshoremen's, etc., Union, etc.*, 210 F. 2d 581, 584-585 (C.A. 9); *N.L.R.B. v. Waterfront Employers of Washington*, 211 F. 2d 946, 949 (C.A. 9); *N.L.R.B. v. International Longshoremen's, etc., Union, Local 10, et al.*, 283 F. 2d 558, 565 (C.A. 9).

The PMA contract recites, moreover, that it was executed by ILWU "on behalf of itself and each and

all of its longshore locals.” (U. Ex. 2, p. 1.) The agreement provides that “there shall be no favoritism or discrimination in the hiring or dispatching of [qualified] longshoremen,” and that “there shall be no discrimination in connection with any action [under] this agreement either in favor of or against any person because of . . . activity for or against the Union” (U. Ex. 2, pp. 46, 54). Under Section 18, entitled “Good Faith Guarantee,” the agreement recites that “the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge.” (U. Ex. 2, p. 79.)

Respondent’s accountability for the conduct of the dispatchers “must be determined in light of the general law of agency.” *N.L.R.B. v. International Longshoremen’s etc., Union, et al.*, 283 F. 2d 558, 563 (C.A. 9). It is well settled, however, that “[i]n determining responsibility for union activities, the principles of agency and its establishment are to be construed liberally.” *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128, 137-138 (C.A. 8), cert. denied, 382 U.S. 904. The sum of the evidence is that respondent selected and paid the dispatcher, selected from its own membership the union representatives on the Committee which directed the dispatcher’s day-to-day operations, and was the express beneficiary of the collective bargaining agreement which establishes the hiring hall and regulates its operations. The Board could reasonably find that the dispatchers executed their duties on behalf of the Local and subject to its control—

in short, that an agency relationship existed between respondent as principal and the dispatchers as agents. See Restatement, Agency, 2d, Section 1. Respondent's connection with the operation of the hiring hall is both direct and substantial, and the devious treatment of the complainants in this case is clearly the very sort of "gimmick or subterfuge" which the International obligated itself not to engage in through its local affiliates. See Section 18 of the PMA-ILWU agreement.

Accordingly under well settled principles of agency, respondent is answerable for the unlawful refusal of Jakovac and Oldland to refer these men to jobs. Paraphrasing the language of this Court (*N.L.R.B. v. International Longshoremen's, etc., Union, et al.*, 283 F. 2d 558, 564, 566), the action taken by the dispatchers was "within the general class of conduct" authorized by the bargaining agreement and conferred upon dispatchers when they are selected by respondent; it is respondent, as the source of that authority, that "must take the responsibility if it is wrongly used." See also, Section 2(13) of the Act. Nor is a contrary result required by virtue of the contract provisions outlawing such discrimination; not only did Armstrong acquiesce in the expulsion of the grievants from the hall in October, but the law is well settled "that an agent may well be acting within the scope of his authority even when he commits an act specifically forbidden by his principal." *N.L.R.B. v. International Longshoremen's, etc., Union, et al.*, *supra*, 283 F. 2d at 565.

This is clearly such a case, and the Board properly found that respondent violated Section 8(b)(2) and (1)(A) of the Act by causing the PMA employers to discriminate against Wilson, Warnken and Thomas.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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July 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

DEFINITIONS

Sec. 2. * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint:

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein,

and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

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(Numbers are to pages of the reporter's transcript)

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<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
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2(a)-2(g)	12	16	19
3	21	52	54
4	48	49	49
5	55	55	57

Respondent's Exhibits

1	94	95	95
2	135	135	135

No. 20,914

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 12,
Respondent.

BRIEF FOR RESPONDENT

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FILED

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IN THE

United States Court of Appeals

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NATIONAL LABOR RELATIONS BOARD,
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vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 12,
Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF FACTS

The charging parties herein are three casuals who have only recently come to the waterfront¹ (Tr. 96)¹ and who have businesses of their own (Tr. 114) or other jobs. They resort to the waterfront whenever they feel like picking up a few extra dollars. They are not members of the regular registered work force. Whenever they desire, they call a "tape" at the Dispatching Hall jointly operated by respondent Local 12 and the Pacific Maritime Association (hereafter PMA) to find out if casual work is available (Tr. 115) and they take such work only if they desire to do so. As casual workers, they work only a day at a time (when work is available) and when they desire to work (Tr. 69).

¹Tr. refers to Volume II of the Transcript of Record filed by the National Labor Relations Board in this Court, being the stenographic report of the hearing held herein before the Board.

There is apparently great competition for this casual work. Thus in the fall of 1964, the period with which we are here concerned, there were only fourteen days of such work a month to be spread out over 400 casualls (Tr. 121) and of the 274 casualls who actually applied for permits in 1964, only 16 were granted (Tr. 145).

This case arose because these three casual workers were dissatisfied with the lack of work and because they "didn't like the method of hiring casualls" (Tr. 36). In August of 1964, they went to see Armstrong, a working longshoreman who was the unpaid president of Local 12. They saw him while all of them were out on a lunch break on a job (Tr. 37, 123). They voiced their grievances—that longshoremen's sons home from college on weekends were allegedly being dispatched ahead of them (Tr. 37)—and Armstrong said that he didn't know what he could do about it because dispatching was in the hands of the dispatcher, an employee of the Joint Labor Relations Committee (Tr. 38). The Joint Labor Relations Committee is composed of an equal number of Local 12 and PMA representatives. Armstrong was right and the fact is that Local 12 has nothing to do with dispatching once it elects its representatives on the Joint Labor Relations Committee and elects the dispatcher (Tr. 136-137, 148, 152, 166). The dispatcher is the agent of, and responsible to, only the Joint Labor Relations Committee (Respondent's Exhibit 2, Section 8.23 [p. 44²]).

²The exhibits introduced at the Board hearing are contained in Volume III of the Transcript of Record.

The three thereupon picketed briefly but ceased when told that a meeting would be set up with the union members of the Joint Labor Relations Committee (Tr. 39). Thereafter they spoke to a representative of PMA who advised them that the proper procedure under the contract was to present their grievance in a written form to the Joint Labor Relations Committee (Tr. 45, 47). This they did (General Counsel's Exhibit 4). In this grievance they made many assertions of fact about which they had no knowledge or information (Tr. 85-86); nevertheless they were afforded an opportunity to, and they did, meet with the Joint Labor Relations Committee (Tr. 50). They were told to go back to work, that the incident would not be held against them, and that the Joint Labor Relations Committee would look into the matter (Tr. 51).

They did go back to the Dispatch Hall and they were dispatched to such jobs as were available. However, they were apparently still dissatisfied and sent another letter of complaint (General Counsel's Exhibit 3), again making statements of fact about which they had no knowledge or information (Tr. 86). They received a reply dated September 29, 1964 (General Counsel's Exhibit 5) in which they were assured by the PMA representative that their complaints were "of grave concern"; that the Joint Labor Relations Committee had the "duty and obligation" to "guarantee" the proper operation of the Dispatch Hall; and that the matter was being investigated and would be taken care of. Instead of waiting for the Joint Labor Relations Committee procedure to resolve

the controversy, they took self-help on October 8, 1964, in the form of causing a disruption in the Dispatch Hall (Tr. 170-174, 180-185). Because of this the dispatcher lost his temper (Tr. 181-182) and evicted them from the Dispatch Hall for that day. They thereupon resumed picketing and stayed out of the hall, thereby making themselves unavailable for work for about a month.

In the meantime, the Joint Labor Relations Committee was investigating the alleged grievance, as it had the power and authority to do under the grievance arbitration machinery of the collective bargaining contract (Respondent's Exhibit 2, Section 17.15 [p. 65] and, specifically, Section 17.4 et seq. [p. 69]). While the Committee was considering this matter, and at its very next meeting, the union members of the Committee were served with the unfair labor practice charges filed by the three in this case. Thereupon, although the union members insisted upon going forward with the grievance under the contract (Tr. 141, 147-148), the employer members refused to proceed any further.

The three did not file any charges against the employer and the only complaint which the General Counsel issued was against Local 12.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS THAT RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE.

This record must be read in the light of the rule laid down in *Universal Camera Corporation v. Na-*

tional Labor Relations Board, 340 US 474, 488 relating to the application of Section 10(e) of the Act:

“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”

With this admonition in mind, it seems clear that the record considered as a whole does not make out a violation of either Section 8(b)(1)(A) or 8(b)(2).

A. The record does not show a violation of 8(b)(1)(A).

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees exercising their rights under Section 7 of the Act. Section 7 gives the employees the right to engage in concerted activities for their mutual protection or to refrain from the exercise of said rights. Thus in order to make out a violation of Section 8(b)(1)(A), the record must establish, according to the standards required by the *Universal Camera* case, that the labor organization: (1) restrained or coerced employees, and (2) that it did so because the employees were engaged in protected concerted activities. We submit that this record does not support findings with respect to either of these two points.

First, there is no showing that Local 12 restrained or coerced any of the three charging parties. After the initial picketing they all returned to the hall and they were dispatched. Their grievance was in the process of orderly adjudication. They were not told to stay away from the hall until after they had created a disturbance therein. (Compare *Pacific Maritime Association and John A. Mahoney*, 140 NLRB 9).

Thereafter, and during the second picketing, they stayed away from the hall and thereby made themselves unavailable for work for almost a month. They returned at a slack time of the year and the record shows that thereafter few if any casuals were dispatched.

The General Counsel suggests that discrimination against the three subsequent to the date that they caused the disruption in the Dispatch Hall can be inferred from the alleged fact that during the fourth quarter of 1964 their earnings were lower, on the average, than they had been during the first three quarters of that year. But the record is uncontradicted that *work dropped off significantly and substantially in the last quarter of 1964* (Tr. 155, 178). Thus the dispatcher testified in response to questions put by the Trial Examiner, and without contradiction:

“Trial Examiner: Just a moment, please, Mr. Oldland. I want to get your best recollection of this matter and I will try to make my questions clear. In the last quarter of 1964, was there any difference with respect to work by the casuals as contrasted with the other three quarters?

A. Yes, there was.

Trial Examiner: And how did that go—what was the difference?

A. Well, in the first three quarters, of course we had—we always had a certain amount of slack times but we had upwards of 75, 100—maybe some days, 110 casuals out at different times, when we had the gangs all working; and after about the middle of August, it dropped down there and I think the average was around 20 some

per day. *There was day in and day out that we didn't have any out at all.*" (Tr. 160).

This case is, we submit, like *Iron Workers Local 433*, 151 NLRB 1092 where the Board adopted the Trial Examiner's intermediate report recommending dismissal of the complaint. In that case, on *three* separate occasions there was a refusal to dispatch and it was charged that this refusal was in retaliation for a protest which had been made regarding the general operation of the hall. The order of dismissal was predicated upon the insufficiency of the evidence to establish that any union representative exhibited any hostility toward, or resentment of, the charging parties because of their participation in the protest. Here, too, the record fails to contain any evidence which would support such necessary findings. Jackovac, the dispatcher, was not a union agent. In any case, neither Jackovac nor anyone else expressed any hostility against the three charging parties because of their protest. Indeed the union officers appear to have been sympathetic. Armstrong told them to go ahead and picket and he acknowledged "how tough it was to be a casual" (Tr. 168) and the union members of the Joint Labor Relations Committee sought to process the grievance in the face of PMA opposition.

In order to sustain an 8(b)(1)(A) violation, it is necessary to find *specific discriminatory motivation*. As was said in the *Iron Workers* case, *supra*:

"However, the issue here is not one of general fairness, but of specific discriminatory motivation in three instances. It may be that a more

precise operation would even have produced different results, but in none of the incidents under scrutiny do we note such deviation from the general mode of operation that an inference of discrimination based on such deviation alone would be warranted * * *” (151 NLRB at 1100).

Furthermore, the isolated character of the dispatcher’s act (Compare *Perl Pillow Company*, 152 NLRB 332) and the fact that, if anything, it was the result of a personal loss of temper (Tr. 181-182) demonstrate that no findings of specific discriminatory motivation can be made.

Second, the record does not support a finding that these three persons were engaged in protected activities. To cause a disruption in a jointly operated dispatch hall is not an activity protected by the Act (Compare *Pacific Maritime Assn. and John A. Mahoney*, 140 NLRB 9), particularly when the dispute is in the course of resolution through the regular grievance machinery set up by the collective bargaining contract (Compare *National Labor Relations Board v. Tanner Motor Livery, Ltd.*, 349 Fed. 2d 1).

B. The record does not show a violation of 8(b)(2) and there can be no order for back pay.

Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3). Section 8(a)(3) prohibits employer discrimination against employees “to encourage or discourage membership in any labor organization.” Thus in order to establish a violation

of Section 8(b)(2), it is necessary that the evidence show, under the standards of the *Universal Camera* case, that the labor organization: (1) caused or attempted to cause an employer to discriminate against an employee, and (2) that such discrimination was for the purpose of encouraging or discouraging membership in the labor organization.

There is no evidence which could conceivably support an 8(b)(2) finding. Nothing at all shows that Local 12 did encourage, or could have encouraged, PMA to violate the Act or that PMA did so. PMA refused, on its own, to proceed with the grievance, after it learned that the charges here had been filed. The union sought to pursue the grievance but PMA, contrary to the union's wishes, would not do so. Certainly it cannot be spelled out from this that the union compelled PMA to do anything. Since there is no charge or complaint that PMA violated the Act, it is not seen how it can be claimed that Local 12 did so (Compare *Local Union No. 12, United Rubber, etc. Workers*, 150 NLRB 312, 316, n. 4).

There is certainly no evidence that any action was taken to encourage or discourage membership in any labor organization or that these three casuals were disadvantaged in any way because of their failure to be or to become members of the respondent union.

Since there is no 8(b)(2) violation, there can be no order for back pay against the local union.

The only provision in the Act which authorizes the Board to issue a back-pay order is found in Section 10(c):

“... back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by [the employee] . . .”

“Discrimination” is a word of art and appears in the operative portions of the statute only in Section 8(b)(2). If the Court accepts the argument that the record considered as a whole does not support a finding of discrimination in this statutory sense, then, even though an order of “reinstatement”³ and to post notices might stand, a back-pay order could not.

The Board itself recognized this in *United Furniture Workers of America and Colonial Hardwood Flooring Company, Inc.*, 84 NLRB 563:

“Like the Trial Examiner, we deny the request made by the Company for an order indemnifying employees for any loss of earnings they may have suffered because of the Respondents’ unfair labor practices. We believe that we are without power to take such a step in the absence of an express mandate from Congress. The amended Act provides that back pay may be required of a labor organization only where it is responsible for unlawful discrimination against an employee. An award of back pay here would be in the nature of damages to the employee for an interference with his right of ingress to the plant, as contrasted with compensation to him for losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his

³It is hard to understand to what these casual workers are to be “reinstated”.

employer in the ordinary case in which back pay is awarded and to which Section 10(c) of the Act has been held for many years to refer. The Act contains *no* provision authorizing the Board to require damages or back pay of a labor organization under such circumstances. Nor is there any legislative history that could impel a conclusion that such awards are authorized. We therefore find that the Board lacks power to grant the remedy requested by the Company in this case.” (At 565-6; italics in original.)

In *Progressive Mine Workers v. National Labor Relations Board*, 187 Fed. 2d 298, the Court said:

“We agree with the Trial Examiner that the Board’s decision in the Colonial Hardwood Flooring Company case precludes the allowance of back pay under our decision. More than that, we are of the view that the Board in that case properly held its lack of authority to make an award against the union under such circumstances. Therefore, that portion of the Board’s order which requires back pay either by the company or the Unions, or both, is set aside.” (at 307)

The short of the argument is that Section 10(c) authorizes a monetary award against the union only when the union is “responsible” for “discrimination.” Discrimination, as used in the statute, is a word of art, appearing only in Section 8(b)(2). If Congress had intended to allow a back-pay award in anything other than an 8(b)(2) case, it would hardly in (10(c), have limited back-pay recovery to cases of “discrimination” well knowing that that term appears only in Section 8(b)(2).

Since there is no discrimination here, in the 8(b)(2) sense of the word, the present order must be modified, at the very least, by striking the provisions relating to back pay.

II. THERE IS NO SUBSTANTIAL PROOF TO SUPPORT THE "AGENCY" FINDINGS.

The Board seeks to fasten liability on Local 12 by a strange agency theory; i.e., via the International's execution of the Pacific Coast contract. The International, of course, is not a party to these proceedings and therefore it became necessary for the Board to construct an elaborate scheme to impose liability upon the Local through a sort of inverse agency rationale. The "agent" is held responsible because of the action of the "principal"—a most unusual circumstance.

Even so, the whole elaborate rationale created by the Board is predicated not upon what *this* record shows but upon what some earlier record (*I.L.W.U.* and *I.L.W.U. Local 10*, 94 NLRB 1091)—admittedly with "different record facts" (TXD, page 8, n. 5 [Volume I of the Transcript of Record filed in this court, page 25, n. 5])—showed. But, as this Court pointed out in a later case involving the same problem, a local is not the agent of the International, absent proof of participation in a joint enterprise, or actual support or control, or a constitutional structure which compels such a conclusion:

"The unfair labor practices charged against the International emanated not from procedures at the hiring hall but from actions taken by the stewards after Satchell's dispatching at the hall

had been completed.⁵ In other cases an international union has been considered engaged in a joint enterprise with a local or responsible for the activities of the local and its agents when the International admitted having joined the local in authorizing the general conduct which led to the unfair practices, see Int'l Longshoremen's Union, 79 N.L.R.B. 1487, 1513-14 (1948), when the International advised, sympathized or financially supported such general conduct, Cory Corp., 84 N.L.R.B. 972 (1949), when the International through its constitution or by-laws or by some other means commanded or required the activities resulting in the unfair labor practices, see N.L.R.B. v. Millwrights' Local 2232, 5 Cir., 1960, 277 F. 2d 217, 221; American Newspaper Publishers Ass'n, 104 N.L.R.B. 806 (1953), or when the International controlled the operations of the Local, see Int'l Brotherhood of Teamsters, etc. v. United States, 4 Cir., 1960, 275 F. 2d 610, 612-614. *No evidence of such connections between the International and Local 10 was presented to the Board in the present case.*

Accordingly, we hold that on the record before us Local 10's Stewards were not acting as agents of the International on the three occasions when they prevented Satchell from working at a job to which he had been properly dispatched."

⁵N.L.R.B. v. Int'l Longshoremen's etc. Union, 9 Cir., 1954, 210 F. 2d 581, *presents a different situation*. There the unfair labor practices were committed as part of the dispatching process itself, and the International was held responsible on the grounds that it had delegated the administration of the hiring hall to the local. To the same effect see N.L.R.B. v. Waterfront Employers of Washington, 9 Cir., 1954, 211 F. 2d 946."

(*National Labor Relations Board v. International Longshoremen's & Warehousemen's Union*, 283 F. 2d 558 at 565, 566. [Court's footnote; our italics].)

The case which presents the “different situation” is the very case which the Board relies upon here. Reliance upon an earlier Board decision (94 NLRB 1091) when a later Court of Appeals’ decision tells us that that very case presents a “different situation” seems to us to be ill-founded. In any case the Board should have at least considered what this Court had to say about the decision upon which it was relying.

None of the relevant factors referred to by this Court is present on *this* record. Furthermore, even in the case relied on by the Board, it was the International as *principal* which was held liable for the acts of the Local as *agent*. Here, apart from the absence of any factors which would justify such a holding, the Board goes in reverse, and seeks to hold that the *Local* is the principal of the International—which clearly it is not.

III. THE BOARD’S DECISION IN THIS CASE IS CONTRARY TO THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN NATIONAL LABOR RELATIONS BOARD v. LOCAL 2, ETC., 360 FED. 2d 428.

In the *Local 2* case, *supra*, the Court of Appeals modified a Board back-pay order which did not appear to contemplate an inquiry into the length of time the employer would have kept the charging parties at work.

The Court said:

“The right to back pay is not a punitive award for having been the victim of an unfair labor

practice; it rests on the right to have had the work and presupposes the ability to do it. To award a man 'wages which he could not have earned would not be remedial but punitive' (Chairman Farmer, concurring, in *Local 57, International Union of Operating Engineers*, 1954, 108 NLRB 1225, 1230). See *N.L.R.B. v. U. S. Truck Co.*, 6th Cir. 1942, 124 F. 2d 887, 889-890; *N.L.R.B. v. Waterfront Employees*, 9th Cir. 1954, 211 F. 2d 946, 953; *N.L.R.B. v. R. K. Baking Corp.*, 2d Cir. 1959, 273 F. 2d 407, 411; *N.L.R.B. v. Ozark Hardwood Co.*, 8th Cir. 1960, 282 F. 2d 1, 8; *The Red River Lumber Co.*, 1939, 12 NLRB 79, 89-90; *Empire Worsted Mills*, 1943, 53 NLRB 683, 690-692 (award approved, 2d Cir. Feb. 14, 1944); *Roskam Baking Co.*, 1964, 146 NLRB 15, 17-18; cf. *N.L.R.B. v. Mastro Plastics Corp.*, 2d Cir. 1965, 354 F. 2d 170, 175; *N.L.R.B. v. Dazzo Products Inc.*, 2d Cir. 1966, 358 F. 2d 136. Paragraph 2(b) of the Board's order must be modified to permit inquiry in the compliance proceeding into the length of time for which, but for the Union's activities, the four men, on the basis of their ability and other factors, would have been kept at work by Astrove." (360 F. 2d at 434.)

Here, since the men were casuals, called the tape whenever they desired, worked only if they desired and only when work was available, the order must be modified to permit inquiry into these questions as they relate to the matter of back pay, all as required by the Court of Appeal's decision in the *Local 2* case.

IV. THE BOARD'S DECISION IN THIS CASE IS CONTRARY TO THE DECISION OF THIS COURT IN NATIONAL LABOR RELATIONS BOARD v. TANNER MOTOR LIVERY, LTD., 349 FED. 2d 1.

In the *Tanner Motor* case, *supra*, this Court remanded to the Board an order which had directed reinstatement with back pay to employees who had been discharged for picketing in support of a non-discriminatory hiring policy. By its remand this Court directed the Board to consider whether picketing in support of such an objective was a protected activity to the extent that the picketers were insulated from discharge, at least where they had not sought to avail themselves of the grievance machinery of the governing collective bargaining contract.

This Court's opinion carefully analyzed the inter-relationships between the rights guaranteed by Section 7 and the requirements established by Section 9 of the Act. It recognized that, while the protection of individual rights including Section 9(a)'s right of the individual employees to present grievances is not unimportant, one of the "principal purpose[s] of the National Labor Relations Act, as amended, is to encourage the practice and procedure of collective bargaining". (349 Fed. 2d at 4.) The Court also noted that it is customary for collective bargaining contracts to contain no strike and no picketing clauses as well as requirements that disputes are to be settled peacefully by grievance and arbitration machinery (*ibid.* at 5).⁴

⁴The collective bargaining contract in the case at bar has precisely such provisions (General Counsel's Exhibit 2, Section 11 [pages 51-52] contains the no-strike provisions and Section 17 pages [63-79] contains the grievance arbitration procedures).

Under such circumstances, this Court reasoned as follows:

“If ‘grievances’ is held to cover any complaint or request of the employees relating to terms and conditions of employment, there may develop a sort of continuous ‘collective-bargaining,’ under the guise of presenting grievances, that could be inimical to the effective operation of the collective-bargaining contract. If employees who thus present ‘grievances’ to their employer may also resort to a picket line when they think that the employer has not properly responded to their demands, the purposes of the Act might well be defeated. There appears to be a difference between collective bargaining and presenting grievances, else why did the Congress limit the proviso in section 9(a) to grievances? Thus the desire of employees for non-discriminatory hiring, while a proper subject for collective bargaining, may not be a proper basis for a grievance. See: *Elgin, Joliet & Eastern Ry. v. Burley*, 1945, 325 U.S. 711, 65 S. Ct. 1282, 89 L.Ed. 1886; *Hughes Tool Co. v. NLRB*, 5 Cir., 1945, 147 F. 2d 69, 158 A.L.R. 1165; *Douds v. Local 1250*, 2 Cir., 1949, 173 F. 2d 764; *NLRB v. Lundy Manufacturing Co.*, *supra*; *West Texas Utilities Co. v. NLRB*, 1953, 92 U.S. App. D.C. 224, 206 F.2d 442; cf. *NLRB v. Cabot Carbon Co.*, 1959, 360 U.S. 203, 79 S.Ct. 1015, 3 L.Ed. 2d 1175; *NLRB v. Puerto Rico Rayon Mills, Inc.*, 1 Cir., 1961, 293 F. 2d 941; *Medo Photo Supply Corp. v. NLRB*, 1948, 321 U.S. 678, 64 S.Ct. 830, 88 L.Ed. 1007.

We do not here hold that there may be no circumstances under which presenting demands or requests, or picketing, or both, by a group of employees, in support of a policy of non-discrim-

inatory hiring, even where there is a collective bargaining agreement in force, may be a protected activity, at least to the extent that the employees cannot be discharged for it. We think the question of whether there are such circumstances here is one that should be fully explored in the first instance by the Board, which is the expert body created by the Congress to administer the Act. We find nothing in the Board's opinion indicating that it gave any attention to this problem. We think that it should do so." (349 Fed. 2d at 5-6.)

By the same token, there is nothing in the Board's opinion in the instant case indicating that it gave any attention to this problem here, nor did it consider the fact that there exists machinery for peaceful resolution of a complaint of the nature asserted by the charging parties in this case. This Court's decision in the *Tanner Motor* case therefore requires, at the very least, a remand to the Board.

CONCLUSION

The petition to enforce the Board's order should be denied; at the very least, the order should be modified or the case should be remanded to the Board for further proceedings.

Dated, San Francisco, California,
September 19, 1966.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN LEONARD,

Attorney for Respondent.

No. 20,914

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 12,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING

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MAY 17 1967

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RESPONDENT'S PETITION FOR A REHEARING

Comes now respondent above-named and, pursuant to rule 23 of the Rules of this court, hereby petitions for a rehearing of this cause and, in support thereof, states the following grounds therefor:

1. The opinion (Slip, page 2) is incorrect in stating that "... registered *members of the union* have first preference of dispatch." (Italics supplied.) The record shows that first preference of dispatch is given to longshoremen registered under the PMA-ILWU contract, without regard to union membership. In order not to have this court's opinion reflect an inaccuracy in so important a matter, the opinion should at least be corrected.

2. The opinion (Slip, page 4) does not state that the meeting of the joint committee on October 21, 1964, was the next regularly scheduled meeting after the three casuals spoke with Ferguson on October 13,

1964, although the record shows that it was. This is important as negating any thought that the parties to the contract—including respondent—were in any way dilatory in the processing of the grievance.

3. The opinion (Slip, page 5) states that the trial examiner concluded that the charging parties were made aware by respondent “that they could not expect employment *unless they became members of the union and remained in good standing*”, and again (Slip, page 7) that, “the effect of such discrimination, the trial examiner could reasonably conclude, was to *encourage them to join the union in order to obtain work assignments.*” The opinion also states (Slip, page 7) that respondent is chargeable with knowledge that its action would tend to encourage the three casuals “*to become union members*”. (Italics supplied.)

All of this is contrary to the record. The trial examiner’s decision contains no such conclusions and, if it had, they would have been totally unsupported by any evidence. The complaint made no such charges and the Board made no such contentions in this court.

4. The opinion (Slip, page 6) states that even though the casuals were disrupting the operations of the dispatching hall, “they should have been advised to this effect and asked to desist.” There is nothing in the National Labor Relations Act which requires a jointly-employed dispatcher to give such advice, or to make such a request, before asking disruptive persons to leave a jointly-operated dispatching hall. By imposing such a requirement on the joint collective

bargaining agent, the court is reading something into the Act which is not there—it is in effect imposing upon collective bargaining representatives and employers a condition which Congress did not see fit to enact. It also opens a Pandora's Box: how clear or firm must the "advice" be, how many times must the "request" be made? To impose such a test is to encourage disruptive tactics in labor relations.

5. The opinion (Slip, page 9) ignores respondent's reliance upon this court's recent opinion in *National Labor Relations Board v. Tanner Motor Livery, Ltd.*, 349 Fed. 2d 1, on the grounds that the activities of the casuals did not constitute a strike or work stoppage, and that respondent did not contend before the Board that alternative grievance procedures were available.

The opinion is in error on both counts.

(a) If, contrary to this court's holding in the *Tanner Motor Livery, Ltd. (supra)* action, the applicable law is to be found in *National Labor Relations Board v. Illinois Bell Telephone Company*, 189 Fed. 2d 124, and *C. G. Conn. Ltd. v. National Labor Relations Board*, 180 Fed. 2d 390, then it is clear that, as respondent asserted in brief and oral argument, the three casuals were never employees and therefore the Act is not applicable to them. It should be noted that, in the *Illinois Bell Telephone Company* and *C. G. Conn* cases, the courts of appeal *refused to enforce* a Board order precisely because the charging parties were not employees. (That is why it was held that their action did not constitute a strike.) If the action of the charging parties here is held not to constitute a

strike because they were not employees, then, equally, *the Act is not applicable to them.*

(b) Furthermore, it is not correct to state that the argument was not the basis of any objection in the agency proceeding. The record before the trial examiner shows that the question of grievance procedure and its exhaustion in lieu of filing charges with the Board was thoroughly covered (see e.g., 47, 50-1, 59-60, 77-8, 83 [cross-examination by respondent established the failure to exhaust available grievance machinery], 84-5, 90-1, 103-5, 137-9, 140, 141 [respondent took position that the three casuals were entitled to have their grievances processed under the contract], 143 [and that only the filing of the instant charge prevented this], 146-8 [the issue of the grievance machinery was just about the only testimony from this defense witness], 150-1 [idem]. In its briefs to both the trial examiner and the Board, respondent asserted:

“ . . . instead of waiting for the Joint Labor Relations Committee procedure to resolve the controversy, they took self-help in the form of causing a disruption in the dispatching hall . . . In the meantime, the Joint Labor Relations Committee was investigating the alleged grievance . . . and while considering it at its next meeting, the union members thereof were served with the unfair labor practice charges in this very case. Thereupon, the employer members refused to proceed any further . . . ”

The trial examiner's decision contains a complete discussion of this matter and shows that the issue was raised. The respondent's very first exception to the

trial examiner's decision was to its failure to find that respondent's president had advised the casuals "that the joint labor relations committee, not the union, had the responsibility for correcting grievances relating to dispatching." Therefore, contrary to the opinion, this question was in fact presented to the agency.

In any case, this court's decision in *Tanner Motor Livery, Ltd., supra*, was not published until after September, 1965, when the exceptions to the trial examiner's report were filed and, therefore, if there was a failure initially to raise the point as sharply as it was raised after this court's decision, that failure is clearly excusable under the provisions of Section 10(e) of the Act.

For the foregoing reasons, it is respectfully prayed that the petition for rehearing be granted.

Dated, San Francisco, California,

May 10, 1967.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,

By NORMAN LEONARD,

Attorneys for Respondent.

CERTIFICATE OF COUNSEL

Pursuant to the provisions of Rule 23 of the Rules of this court, I hereby certify that, in my judgment, the annexed petition for rehearing is well founded and that it is not interposed for delay.

NORMAN LEONARD.

United States Court of Appeals

NINTH CIRCUIT

No. 20967

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S INTERIM OPENING BRIEF

FILED

MAY 1 1967

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NO. 20967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S INTERIM OPENING BRIEF



STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION

A nineteen-count indictment was returned against the defendant MARVIN LUSTIGER, charging him with a violation of 18 U.S.C. Sec. 1341 (mail fraud). Each of the counts was identical except for the fact that the defendant was charged with defrauding a different person in each count (CT^[1] 2 - 22, inclusive).

On February 11, 1964, the defendant appeared before the Honorable James A. Welch, United States District Judge, and pled not guilty to each of the nineteen counts of the indictment (CT 23-25). Thereafter, and upon motion of the defendant, all of the proceedings were had in the Tucson Division of the United States District Court (CT 28-29).

On or about February 26, 1965, the defendant moved the Court to dismiss the indictment or, alternatively, moved for disclosure of the Minutes of the Grand Jury (CT 30-35). This motion was denied on March 20, 1965 (CT 327).

On or about March 15, 1965, defendant brought on for hearing before the United States District Court a MOTION TO DISMISS FOR LACK OF JURISDICTION; FOR INADEQUACY OF EVIDENCE BEFORE THE GRAND JURY TO SUSTAIN THE INDICTMENT; AND, IN THE ALTERNATIVE, ON THE GROUND THAT 18 U.S.C.A. 1341 AND THE INDICTMENT HEREIN ARE UNCONSTITUTIONAL IF THE INDICTMENT HEREIN STATES AN OFFENSE AGAINST

[1] As used herein, CT refers to the Clerk's Transcript on Appeal and RT refers to the Reporter's Transcript on Appeal.

THE UNITED STATES UNDER 18 U.S.C.A. 1341, AND MEMORANDUM OF POINTS AND AUTHORITIES AND NOTICE; AND A MOTION TO DISMISS INDICTMENT ON THE GROUNDS EACH COUNT FAILS TO STATE AN OFFENSE AGAINST THE UNITED STATES AND EACH COUNT IS DUPLICITOUS (CT 36-50 and 51-58, respectively). These motions were denied (CT 327). On said date, and in addition, defendant made a MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, AND TO TAKE THE DEPOSITION OF DOYLE C. MARSHALL IN ORDER TO AFFORD DEFENDANT WITH DUE PROCESS UNDER THE UNITED STATES CONSTITUTION, AND MEMORANDUM OF AUTHORITIES AND NOTICE (CT 59-65). Further, and on said date of March 15, 1965, defendant made a MOTION FOR DISCOVERY AND INSPECTION UNDER RULE 16 FRCrP AND MEMORANDUM AND NOTICE (CT 66-75) and a MOTION FOR BILL OF PARTICULARS AND MEMORANDUM OF AUTHORITIES AND NOTICE (CT 76-84). An Affidavit, together with supporting documentation, was filed in connection with and in support of all of the above referred to motions (CT 85-194, inclusive). These motions were denied without prejudice to renew them at the end of the government's case (CT 327-328).

On or about April 3, 1965, a pretrial was held in the instant case. At the pretrial, many of the documents which were introduced into evidence or offered for introduction into evidence were marked for identification. Further, waivers of foundation as to these documents were obtained and other relevant orders were made. Finally, numerous stipulations were entered into between the parties to the action.(CT 195-230) The effect, significance and admissibility of the information contained in many or all of the stipulations will be discussed in later portions of this brief.

On or about June 15, 1965, the defendant and his attorney waived special findings of fact, which waiver was consented to by the United States Attorneys' office (CT 231).

On or about June 28, 1965, defendant was convicted of violating Title 18, U.S.C. Sec. 1341, as charged in Counts I to VIII, inclusive, and Counts XI to XIX, inclusive, of the indictment. The defendant was fined the sum of \$1,000.00 on each of Counts I to VIII, inclusive, and Counts XI to XVIII, inclusive. The imposition of sentence on Count XIX was suspended for a period of six months on condition that the fines imposed on Counts I to VIII, inclusive, and Counts XI to XVIII, inclusive, be paid within 90 days from the date of judgment (CT 232).

On or about June 28, 1965, counsel for the defendant and counsel for the United States Government stipulated that the cashier's check in the sum of \$14,000 payable to the Clerk of the United States District Court for the District of Arizona, which deposit was posted simultaneously with the filing of the said stipulation, together with \$3,000 which the defendant had theretofore posted for bail, could serve as bond pending further proceedings in the trial court and in the United States Court of Appeals for the Ninth Circuit and in the United States Supreme Court, by application for *certiorari* or otherwise. It was further stipulated that should the judgment entered on June 28, 1965, be finally affirmed on appeal, the total sum of \$17,000 would be applied by the Clerk to the payment of the fines imposed by the judgment, and if the judgment was reversed, then the said sum of \$17,000 would be returned to the defendant (CT 233).

THE JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE
Vol. 34, Part 2, 1904. (Second Series.)
LONDON: PUBLISHED BY THE INSTITUTE, 21, BEDFORD SQUARE, W.C. 1.
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1904.

In July, 1965, the defendant filed a MOTION FOR JUDGMENT OF ACQUITTAL (CT 234-236) and a MOTION FOR NEW TRIAL (CT 237-305, inclusive). The government filed a Memorandum in Opposition to both of said Motions on or about October 25, 1965 (CT 306-312). The defendant filed a REPLY MEMORANDUM OF DEFENDANT ON MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL (CT 313-316) on or about November 12, 1965.

On or about January 24, 1966, defendant filed a NOTICE OF APPEAL (CT 317-318). On February 3, 1966, by stipulation, time was extended for the defendant to print, serve and file the record on appeal and take all steps necessary in the prosecution of his appeal (CT 319), and the Court ordered the extension of time (CT 320). Appellant's designation of record on appeal was filed on February 2, 1966 (CT 321-323), and the government's DESIGNATION OF ADDITIONAL PARTS OF THE RECORD ON APPEAL was filed on February 3, 1966 (CT 324).

This Court has jurisdiction to review the judgment of the District Court, pursuant to 28 U.S.C., Sections 1291 and 1294.

[Several of the references to the Clerk's Transcript may not be accurate, because the copy of the transcript received by appellant's counsel is almost illegible from page 325 - page 328, inclusive.]

STATEMENT OF FACTS

A. Introductory Comment

Due to the pressure of time imposed upon appellant's counsel by the Court, this brief will have to be supplemented in the "Argument" portion at a later date.

Counsel has attempted herein to set forth as completely as possible the Statement of Facts and the points upon which appellant is relying.

The deficiency in the "Argument" section is the result of several factors. (1) The number of cases to be read relating to Federal "mail fraud" indictments alone is staggering (See Annotation under 18 USCA 1341) and a competent and professional analysis of these cases and the rules of law enunciated therein with relation to the facts of the instant case cannot possibly be accomplished within the time allotted by this Court. (2) The facts of the instant case are complex and the exhibits, both introduced and proffered but not received, are extremely numerous. In addition, there are many "stipulations" made prior to trial which have to be carefully scrutinized. (3) There are novel and esoteric questions of law and fact presented in this appeal which do not lend themselves easily to the ordinary type of legal research. (4) Finally, there is the tangential problem presented, not unrelated to this appeal, in that the appellant has presented substantial evidence to this Court by way of motions that by virtue of a real conflict of interest of trial counsel - unknown to appellant at the time of

trial (but possibly known to the government) - appellant was denied the opportunity to present a full defense and was, in fact, denied effective assistance of counsel.

The supplementary opening brief will therefore concern itself with such further detailed legal authorities as can be found which are applicable to the instant case; a further analysis of the facts herein as applied to the law; and a short synopsis of the matters which could/should have been presented to the court by trial counsel and the manner in which these matters would have substantially affected the outcome of the trial.

B. Summary of the Indictment^[2]

In the indictment, the defendant was charged with having devised a scheme and artifice to defraud within the provisions of the mail statute, by:

1. Organizing LM as a corporation, becoming an officer thereof, and actively engaging in its business (Para 2);
2. LM's use of P. O. Box 13349, Phoenix, Arizona, as the mailing address for LM (Para. 3);
3. Causing LM to enter into contracts to purchase approximately 35,000 acres of unimproved Mohave County land and subdividing some of them (Para. 4);

[2] As used in Section B of the Statement of Facts, all references are to Count I of the indictment, since the allegations in Count I were incorporated into the other counts. In addition, all references to LM contained in this brief are intended to refer to Lake Mead Land & Water Co., an Arizona corporation.

4. LM's offering for sale to the public parcels within such subdivision, on a payment in full or deferred payment plan, by means of advertising sent through the United States mail (Para. 5);

5. LM's entering into contracts with the public for the sale of parcels within such subdivision (Para. 6);

6. LM's using, in connection with the sale of such parcels, a brochure sent through the United States mail and containing the following allegedly false and fraudulent pretenses (Para. 7):

(a) "Join us for Pleasure and Profit at Lake Mead City, Arizona." [3]

(b) "Lake Mead City...an enchanted city in the making, a truly outstanding New Frontier for wise investors."

(c) "Lake Mead City. Arizona's best located planned community."

(d) "Invest in this booming area now."

(e) "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers."

(f) "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."

(g) "When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly."

[3] It was stipulated that: "The promotional and sales technique of naming a subdivision or location, which originally is not in fact an incorporated city or town, a 'city' or 'town' is of common usage as a sales and promotional technique. Examples thereof are: Big Bear City, California; Meteor City, New Mexico; Bermuda City, Arizona; Dinosaur City, Arizona; Salton City, California; Desert City, California; Calico City, California; Horizon City, Texas; Sun City, Arizona; Havasu City, Arizona; Arizona City, Arizona; Toltec, Arizona; California City, California; Sacramento City, Arizona." (Stip. 3, par. F.)

(h) "When development takes place, such as Lake Mead City, history shows that land values rise rapidly."

(i) "Seldom, if ever, will you find it possible to purchase so much good land for such a low price."

(j) "You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona."

(k) "The best located resort property in the West."

(l) "Location more than any other factor, determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting within the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned, deeded properties in Lake Mead City. Get yours now!"

(m) "Most of the region shown on this map consists of Federal land, and is not available at any price. This makes the choice privately-owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured."

(n) "Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivision has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens."

(o) "Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues."

(p) "Thousands of wise investors have already decided that our special offering represents a worthwhile holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property."

(q) "Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and the majestic beauty of the Grand Canyon."

(r) "Less than 5 miles from the Lake."

(s) "Lake Mead City actually begins less than 5 miles from the Lake."

(t) "Lake Mead City begins less than 5 miles from the lake."

(u) "Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area."

(v) "These estates nest in the center of the West's greatest recreational facilities."

(w) "Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas."

(x) "County roads have existed in Lake Mead City for several years, and are maintained by the county."

(y) "County roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times."

(z) "Lake Mead City is easily reached, with access via U. S. Highways and County Roads. An airfield and a boat anchorage are nearby."

(aa) "Modern schools, churches and shopping facilities in nearby Kingman, the county seat, and the largest city in northwest Arizona."

(bb) "All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone." [4]

(cc) "IMPORTANT! Plenty of water." [5]

[4] The full paragraph from which this sentence was taken (Ex. 37, p. 21) reads: "All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone. Easements have already been provided in the County records to guarantee access for utility installation to every parcel. These include water, electricity, gas, and telephone. Power lines have recently been extended along the Pierce Ferry Road, at its western terminus, and we believe that full electric power will be made available to our clients in the reasonable future."

[5] The full text of the brochure statement was contained in Ex. 37, p. 21, and is Appendix "A" hereof.

(dd) "All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access."

(ee) "All parcels have been platted and recorded, with road easements laid out to assure you of access";

7. LM's "misleading" and "deceiving" of the public, by means of "photographs and misleading and false statements" within said brochures, and by vicinity maps, into believing that houses already existed on the said Lake Mead City subdivision and that "water for drinking, boating, water-skiing, fishing and swimming sports was abundant" on said subdivision, "which said photographs, statements and vicinity maps" were alleged false in the following respects (Para. 8):

(a) "A photograph of a water pond with the caption 'favorite swimming hole' thereunder, on page 25 of said brochures."

(b) "A picture of a house with the caption 'and comfortable ranchhouse' thereunder, on page 25 of said brochures."

(c) "The statement at the bottom of page 25 of said brochures: 'The above scenes were all photographed within the boundaries of Lake Mead City...a wonderful place to enjoy life.'"

(d) "Six lake scenes appearing on page 29 of said brochures, with the statement thereunder: 'This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City.'"

(e) "Two photographs of water ponds appearing on page 21 of said brochures, on which page appears the declaration in bold print: 'IMPORTANT! Plenty of water . . .' [6] and the statement on page 24 of said brochures that all pictures on page 21 were actually photographed

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 study and the objectives of the research. It also outlines the
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 second part of the paper discusses the implications of the
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within the boundaries of Lake Mead City."

(f) "A photograph showing a lake in the background, appearing on page 9 of said brochures, and the statement appearing below said photograph that 'Lake Mead City begins less than 5 miles from the lake.'"

(g) "A vicinity map of the Lake Mead City area showing thereon two wells, three springs and a water pipe line";

8. Fraudulently representing in plat maps mailed to LM's customers that "special care had been taken to select for them" parcels in the choicest access or choice acres or near the Pierce Ferry Highway (Para. 9);

9. Misrepresenting by special circulars, advertising and price lists mailed to LM's customers that prices of parcels would increase soon "because of the rapidly increasing value in the area, that there were but few remaining lots in choice areas and unless said persons intended to be defrauded purchased lots or parcels or additional lots or parcels immediately, they would never again be able to purchase property in the said Lake Mead City subdivision at the price at which said properties were then being offered," which was allegedly false in that properties in the LM subdivision were not rapidly increasing in value and price increases were arbitrarily made by LM (Para. 10);

10. Concealing certain allegedly material facts as to the parcels offered (Para. 11), to wit:

(a) "The said Lake Mead City subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes";

(b) "Many of the said Lake Mead City subdivision

units have rocky hills and unbridged natural drainage washes thereon";

(c) "Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle";

(d) "Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash";

(e) "The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles from the nearest existing electric power and telephone lines";

(f) "Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon";

(g) "The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails";

(h) "Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West.

C. The Evidence Presented to the Court

1. Introduction.

This portion of the brief is designed to present to the Court all of the evidence that was presented at the trial, whether by way of the stipulated facts and exhibits or by way of testimonial evidence and exhibits presented at the trial.

(a) The Defendant And His Relationship to LM.

LM was formed in 1960 by an Arizona attorney at the

request of defendant (Stip. 1, par. 1). Defendant and his family owned all of the stock of LM, and defendant, as president, was actively engaged in the direction of its business (Stip. 1, par.2-6). Defendant was solely responsible for all of its policies and advertising (RT. 370).

(b) LM's Business and Method of Operation

LM conducted its sales of land by mail. Ads were placed by mail via a LM-owned "house agency" in periodicals distributed by mail and LM's customers responded by mail (Stip. 1, par. 10, 13, 15; Stip. 10, par. 35; Ex. 36; RT 363, 364). The sales were for cash or by deferred payments bearing 6% interest on declining principal (Stip. 1, par. 13). Mail and payments from its customers were sent to LM at P. O. Box 13349, Phoenix, Arizona (Stip. 1, par. 12).

An employee of LM, engaged by its lawyer (RT 79), picked up LM's mail at this post office box, placed it in envelopes and mailed it unprocessed to defendant at Azusa, California (RT 79, 80; Ex. 61, 62). In Azusa, the mail was processed by National Land Company (owned by defendant), which had a contract with LM to do this work (RT 363). Return mail and customer payments were transshipped by bus to Phoenix where the same employee picked them up and mailed the return mail from Phoenix and deposited the customers' payments into LM's Phoenix bank account (RT 81, 82, 362, 363; Stip. 1, par. 12). LM operated from the office of its attorney, where its records were kept (RT 359, 360).

(c) LM's Land and Subdivision[7]

LM entered into contracts or options to purchase some 64 full or partial sections of land in Mohave County, Arizona (EX 22, 23), which even the government's "prosecuting witness" (RT 6) conceded is "beautiful" country (RT 407). These sections consisted of the odd-numbered sections in a checkerboard pattern, the even-numbered sections (as with all other Mohave County subdivisions (Ex. 24A)) being owned by the federal government (Ex. 23; Stip. 1, par. 17). They are located roughly 60 miles from rapidly expanding Kingman (RT 459) and reached via any one of three routes: Highway 93 and the Pierce Ferry Highway; the Hill-top route; and the Hackberry route (RT 393-395, 444-445, 286-288). All these roads are county maintained and, since 1958 - with the advent of subdivision activity in the area, at Lake Mohave Ranchos (RT 448, 449, 289, 291), Meadview (RT 296, 297, 454, 455), and Lake Mead City (RT 294, 295) - have been gradually improved (RT 439-447). In addition to these county-maintained roads, there were numerous ranch roads in these sections (RT 443, 260, 261).

Twenty of these 64 sections, after a water and topographic survey (RT 364), were platted and subdivided by the engineers who customarily did this work in Mohave County (RT 317) into some 6800 parcels (Ex. 36). These engineers considered the possibility of subdividing an additional eight sections, but their

[7] Appendix "B" attached hereto is a map that pictorializes LM's holdings, its subdivided sections, the sections from which parcels were offered to the public and the sections in which customer-witnesses had bought parcels.

recommendations to LM, that they not be subdivided because of terrain, were followed (Ex. 54). The engineers were instructed with respect to their subdivision engineering:

"* * * all and only the land within the sections in question (or the pertinent portions being subdivided) that on field inspection was deemed useable was to be subdivided into parcels for sale; that such useable land was to be subdivided into parcels of 1-1/4, 2-1/2, 5 and 10 gross acres (with no parcel to be smaller than 1-1/4 acre), the size of each parcel to be governed as could best be determined by field inspection with regard to the terrain; that each parcel so subdivided was to have at least one reasonable building site; that each 1-1/4 acre parcel was to have roadways on the frontage only; that each 2-1/2 acre parcel was to have roadways on two sides; that each 5 acre parcel was to have roadways on three sides; that each 10 acre parcel was to have roadways on all four sides; that the roadways were to be laid out as symmetrically as possible with regard to the respective parcels and parcel sizes, but with the understanding that some of such roadways, because of terrain, might not be such, under present conditions, as to make actual street or road construction reasonably or economically feasible; and that all lands not so deemed useable were not to be subdivided into parcels for sale but were to be designated and reserved for recreation areas and wildlife refuges, etc." (Ex. 52, 53)[8]

[8] That these instructions were followed is uncontroverted (Ex. 52, 53). Thus, the force of the government's evidence about the mountainous nature of the southeast corner of Unit 17-28-16 (RT 273, 311, 348, 349, 356, 357, 379; Ex. 60, 60A, 60B) was reduced to insignificance when it is remembered that this was an area set aside as a game refuge (Ex. 26). Similarly, the government's evidence about the "big wash" in Unit 7-30-16 (RT 262, 263, 383) was also rendered nugatory, insofar as affording any predicate for a fraud charge is concerned, when it finally became clear that the 50-year (RT 332) rain which had so transformed this section (RT 309, 310, 311) occurred in the fall of 1962 (RT 405, 406), not in 1961 (RT 307, 308). By that time, LM had long ceased selling parcels (RT 367) and, no more than its engineers nor any Tucson subdivider, could not be charged with fraud for having failed to anticipate a 50-year rain. Additionally, while the government proved that parcels were sold from this unit, they failed to prove the sale of a single parcel in the "big wash." The same can be said about all of the government's testimony about washes and terrain in other subdivision units (RT 380-383, 385-392); in no instance did the government prove that LM sold any parcels within the specific area that was described. The engineering evidence that the terrain, as disclosed by field inspections, governed the various parcel sizes (Ex. 52, 53; Cf. Ex. 26) remained untarnished.

While in some instances perhaps difficult or expensive (RT 263, 330, 334), one layman's view was that, except in the northeast corner of Unit 13-30-16^[9], all roads provided for by the engineers could be installed (RT 337).

LM intended to put in the streets shown by the subdivision plats, stake the individual parcels and to install individual parcel markers, but had no intention of providing water, telephone or sewer service for the parcels; nor did it have any plans to build shopping areas (RT 365)^[10].

The subdivision plats for the twenty subdivided sections, together with the LM-improved building restrictions, were recorded with the Mohave County Recorder (Ex. 26, 28; Stip. 1, par. 14). Pursuant to filings with the Arizona Real Estate Department (RT 370), LM offered for sale to the public parcels from eleven of the twenty recorded subdivisions (Ex. 27, 44; RT 361), some of which were physically located within the Lake Mead Recreational area (Ex. 27; Stip. 1, par. 18). These sections contained some 4200 parcels, of which some 3200 became the subject of a sale (Ex. 44).

The nearest of the LM subdivision units were 21 miles from the nearest existing power and telephone lines; were

[9] There was no showing that LM sold any parcels in this portion of this unit.

[10] Had he been called to testify in his own behalf, the appellant could have testified as to the intentions of LM in connection with the construction of streets, the staking of individual parcels, etc.

15 miles by existing roads from the nearest place on Lake Mead accessible by existing roads; and were 4 miles on a straight line from the nearest place on Lake Mead accessible by existing roads. The farthest of the LM subdivision units were 38 miles from the nearest existing power and telephone lines; were 40 miles by existing roads from the nearest place on Lake Mead accessible by existing roads; and were 17 miles on a straight line from the nearest place on Lake Mead accessible by existing roads (Stip. 1, par. 20, 22, 23; RT 393-395). Of the 20 sections which LM subdivided, six were accessible by ordinary passenger car, and of the rest, all but five were accessible by pickup, scout or jeep (RT 376-378, 277-279).

At the time of LM's sales, the only completely developed water source on LM's holdings was the Clearwater or Lucky 7 Well and Tank located in Unit 7-30-16, in which LM had a one-half interest, and which was also the source of water for residents at the nearby Meadview subdivision (Stip. 1, par. 24; RT 298). Other developed water sources on LM's holdings included the Grapevine Well in Section 17-29-16 and the Duncan Springs in Unit 17-28-16, and various earthen cattle tanks (Stip. 1, par. 24). On October 18, 1963, LM completed the successful drilling of a well in the Building Area (Unit 23-29-17) and subsequently installed pumping equipment, a water storage tank, and other accessories (Stip. 1, par. 26). The ground water potential of LM's lands were as stated by its engineers, the full opinion of one of whom was set forth in full in LM's offering brochure (Stip. 1, par. 25; Ex. 37A through F, p. 20; Ex. 49):

"Because I have visited and observed the field conditions of the intermittent water producing streams, springs and dug and drilled water wells on your land holdings together with the surrounding area, I know that the underlying area is a water supply of considerable capacity. Water sources have been developed and used in the past for stock-watering. Recent well drilling has brought in wells from a depth of 60 feet to a maximum depth of 660 feet below the surface. Earthen dams have been used to hold surface waters for stock-watering throughout the year. Conservation of surface waters by proper storage should be noted also. Spreader dams could conserve natural rainfall by storage for better vegetation growth.

"The surface of your lands consists generally of good soil covering granites and related formations. These formations have a tendency to absorb and hold water, thus providing a natural water storage. When penetrated by wells these deeper formations provide a good grade of potable water. The wells, springs and water sources included within the boundaries of your lands or adjacent areas provide water of excellent quality for drinking and domestic use, both from a bacteriological and chemical standpoint, according to reports made on samples.

"It is my belief that different portions of your property will produce water from underground sources. The depth to a good supply of water will vary between 60 and 660 feet below the surface.

"There are springs and a shallow well in the eastern part of your estate on New Water Plateau, which indicates good possibilities for developing a domestic supply.

"There is no question in my mind but that a good supply of water could be collected in what is generally known as the Iron Springs area in the NW part of T.28 N., R. 16W., which could be piped to a great part of your estate, (much by gravity flow) in anticipation of future community development.

"The subject of water on your estate, for the most part, compares favorably with other similar areas in this part of Mohave County, Arizona, and in fact provides water potentialities above the average. Incidentally, Lake Mead, north of your property, is one of the largest storage dams in the world. Its waters are clear and potable, being excellent for domestic use."

(d) Financing Pertaining to LM's Business

LM's purchase price for its holdings ranged \$33.20 to \$125.00 per acre (Stip. 1, par. 19). Its sale price originally was \$395.00 for 1-1/4 acres, subsequently increased to \$495.00 per 1-1/4 acres (RT 361). In the Lake Mead City Building Area (Unit 23-29-17), however, the price was \$695.00 for 1-1/4 acres (RT 369).

The record discloses that as of August 31, 1963, LM had received \$793,837.56 as a result of its sales and had contracts receivable as of that date in the amount of \$729,639.10 (Ex. 44). As of that date LM had expended at least the following sums (Ex. M):

Land Acquisitions	\$263,890.42
Escrow	3,278.10
Engineering & Development	36,552.61
Legal in connection with land acquisition	8,853.23
Tract Office	1,996.43
Model Cabins	5,750.00
Furniture & Fixtures	445.34
Advertising & Printing	79,419.79
Legal & Audit Fees	29,347.78
Stationery & Supplies	6,897.83
Permits & Fees	2,768.78
Telephone & Telegraph	1,859.48
Rent	4,899.00
Insurance	<u>1,844.62</u>
Total	\$447,803.41

As of the same date, LM was indebted on land purchases in the amount of \$607,068.73 and had an estimated liability for required land development in the sum of \$169,687.58 (Ex. L).[11]

(e) LM's Period of Sales and Its Legal Difficulties

LM's holdings, originally owned by the witness Smith (RT 217, 218, 367), were purchased by LM after passing through several hands (RT 367). The Smiths' original sale purported to reserve "range use rights," which led to Mohave County court litigation (RT 218, 222, 223, 367). The Smiths claimed in that litigation that LM, because of the "range use rights" reservation, could not put roads to or in any of its sections nor put up any buildings or fences within sections, nor stake any parcels (RT 224, 225). This contention was sustained by the lower court (Ex. GGG, HHH):[12]

"Defendants are entitled thereunder to the full and exclusive use of the surface of the lands for grazing purposes.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

" * * *

"3. That the reservation of range-use-rights by the defendants is valid and the defendants are entitled thereunder to the full and exclusive use of the lands for grazing purposes.

"4. That the plaintiffs and counter-defendants are barred and forever estopped from having or claiming any right or title to the above described premises

[11] This Reserve for Land Development at one time was as high as \$258,023.25 (Ex. 20).

[12] At trial time, Smith was continuing to insist on his claim. On July 1, 1965, the Arizona appellate court rejected such contention. (1 Az. A 424, 403 P. 2d 828)

adverse to the reservation of the defendants and counter-claimants in and to all range-use-rights, * * *

Subsequently, LM made another deal with the Smiths but that, too, erupted and further litigation ensued (RT 225, 226, 367, 368); whereupon, in 1962, LM quit its selling program (RT 367). The government does not charge that LM's title difficulties, or its litigation relative thereto, has any part in or is a factor in its charge of violation of the mail fraud statute (Stip. 10, par. 36).

(f) LM's Advertising Materials

(1) The Basic Mailings

LM attracted customers by periodical advertisements, all of which were substantially the same. The advertising was introduced into evidence as Ex. 29, and Appendix "C" attached hereto contains a copy of said advertising.

A potential responding customer received a brochure (Ex. 37 Series) and a fact sheet (Ex. 39 Series) (RT 96) and an order form (Ex. 40 Series).

Within the brochure were all of the statements set forth in paragraph 7 of the indictment and all of the pictures and captions set forth in paragraph 8 of the indictment. The fact sheet (almost all of which was incorporated in later versions of the brochure (See p. 27 of the Ex. 37 Series)) reads in part:

"FACT SHEET
FOR THE WISE INVESTOR AT LAKE MEAD CITY

"WE HOPE THAT YOU WILL READ THIS THOROUGHLY SO THAT YOU WILL MORE FULLY APPRECIATE THIS REMARKABLE INVESTMENT OPPORTUNITY IN BEAUTIFUL ARIZONA. WELL-INFORMED CLIENTS ARE OUR BEST ADVERTISEMENT.

"These estates in Lake Mead City are a brand new project.

We believe this to be one of the largest and most ambitious undertakings of its type in the Western United States. It is still new in the sense of being without present city conveniences. This means that for now --- no streets or utilities are available --- otherwise the price of these parcels would be at least ten times more! Even so, there are existing County-maintained roads through Lake Mead City which connect with United States Highway 66, United States Highway 93, and the County seat at Kingman, a short 60 miles away. Las Vegas is also conveniently nearby. We offer good usable land (no swamps here!). All our Units have been surveyed, subdivided, platted and recorded. All have been approved by the County Health Department for use of individual sewage systems, including septic tanks and cesspools (normally included in the price of a home). This is good soil, and we doubt that there will ever be justification for installation of a piped sewage system. All properties have fully met the rigid requirements of the Arizona State Real Estate Department, and all have been approved by the Arizona State Department of Health. These lands are unusually attractive, located within one of the most extensive Joshua tree forests in the world.

"Real Estate experts will tell you that the surest and safest way to profit from buying and selling land is to buy undeveloped property, at a low price, in a good location. We know, that from the standpoint of year-'round climate and recreational facilities, Lake Mead City enjoys one of the choicest locations ever made available, particularly at these surprisingly low prices. Huge profits are made daily in Real Estate, by people who prepare for the future, by buying while prices are low.

"Virtually all the land within several miles of the Lake is owned and maintained by the United States Government, so that we may all use and enjoy this fabulous area. Lake Mead City has some of the closest privately-owned properties ever offered for public sale. The National Park Service operates facilities within the Lake Mead National Recreation Area (Lake Mead City extends right into the Recreation Area). A road maintained by the Government and the County leads directly from Lake Mead City to the Pierce Ferry Boat Anchorage. Remember, most of the land in this area is owned by the United States Government, and is not for sale, at any price. This is one important reason why we believe the choice, privately-owned deeded properties in Lake Mead City will show important price increases in the coming years.

"There are excellent water sources both on and near our property. In this connection, please read Pages 20 and 21 of your color brochure. All photographs shown on Page 21 were taken within the boundaries of Lake Mead City. This is proof of the good water to be found here. As soon as there is enough demand for a public utility water company in this area, we hope to cooperate in the establishment of same. Electric lines are continually being extended along the Pierce Ferry Road and we believe that full electric power will be made available to our clients in the reasonable future. Butane, or bottled gas, is used generally throughout the area.

"There are no assessments, and none are contemplated. Residents will decide themselves regarding asphalt streets, sidewalks, etc. We have a huge amount of work still to do here, and we ask that you bear with us. Rome was not built in a day, and the same for Lake Mead City. Remember that this is a genuine 'ground-floor' opportunity, and properties are now being offered at a fraction of their future potential value.

* * * * *

If the customer responded with an order and down payment, he was sent a vicinity map (Ex. Series 38) on which was marked his subdivision unit (section) and a plat map (Ex. Series 28) showing his individual parcel together with a contract of purchase (Ex. 41).

Every vicinity map (Ex. 38) contained a scale from which any reader could readily translate the mileage of his subdivision unit (and with the plat map the mileage of his individual parcel) from all principal landmarks, i.e., Lake Mead, County maintained roads, and water sources in the area. In the upper left-hand corner of the vicinity map appeared: "most of the property shown on this map is Federal Land . . ."

(2) The Pictures Within the Brochures

All of the brochure pictures described in the indictment were taken in the presence of the company's independent

engineer:

"* * * I have re-reviewed that certain 32-page brochure of Lake Mead Land and Water Co., a copy of which is enclosed. With respect to certain of the pictures therein, I was personally present during the taking of same on a date which was in late 1960. On that occasion I was met by Mr. Jerry Wisotsky and Mr. Max Miller of Imperial Lithographers, Inc. of Phoenix, and Miss Darlene Zaleski and Miss Ruth A. Schalip, Bonanza Airlines hostesses, and took them through the Lake Mead City area and to the lands of Lake Mead Land and Water Co. The following is my best recollection with respect to those pictures.

"The picture at the bottom of page 5 of said brochure was taken by Mr. Wisotsky of Mr. Miller and the two girls on Lake Mead Land and Water Co. property. The pictures on pages 8 and 9 were taken by Mr. Miller and are pictures of the said girl or girls at locations enroute to or near Lake Mead Land and Water Co. lands. The picture at the top of page 21 of myself and one of the girls was taken by Mr. Miller at the Clear Water or Lucky Seven Well owned by Lake Mead Land and Water Co. The picture at the bottom left hand side of page 21 is a picture of the watering tank at the Diamond Bar Ranch headquarters located within the Lake Mead City area. It was taken by Mr. Wisotsky. The picture at the bottom right hand side of page 21 is a picture taken at a cattle watering tank located within the Lake Mead City area. It was taken by Mr. Miller. The picture at the top of page 25 was taken by Mr. Miller and again is a picture of the watering tank at the Diamond Bar Ranch, a watering tank which the ranch foreman's children, to my knowledge, used for swimming. The picture in the middle of page 25 is of the Ranchhouse at the Diamond Bar Ranch headquarters within the Lake Mead City area. It, again, was taken by Mr. Miller. The picture at the bottom of page 25 was taken on one of the properties actually owned by Lake Mead Land and Water Co. The picture in the upper left hand corner and the picture which is in the middle on the right hand side of page 29 were both taken by Mr. Miller on this trip at Lake Mead near Pierce-Ferry. In my opinion, all of those pictures correctly depict the scenes that we saw at those times and places . . . " (Ex. 52)

The Diamond Bar Ranch is within the area of LM holdings and virtually surrounded by LM holdings (Ex. 22, 38). The picture of the "favorite swimming hole" (Ex. Series 37, p. 25) is of a watering tank that was used by the ranch foreman's children

for swimming (Ex. 52)^[13] as it had been previously used by predecessor occupants of the ranch (Ex. H).

(3) The Supplemental Mailings

Subsequently, LM customers were furnished with (Stip. 1, par. 16):

(a) A copy of the May 1962 Arizona Highways magazine (Ex. 40J) which, on pages 14 and 15, contained the map that is set out in Appendix "D" hereof.

(b) A "price increase notification sheet" (Ex. 40K) which read in part:

"IMPORTANT - READ THIS NOW
PRICE INCREASE AT LAKE MEAD CITY, ARIZONA

"Effective November 1, 1961, prices on all unsold properties have been increased from \$100 to \$500. During the past few months, we have sold thousands of acres to thousands of satisfied clients. One of the reasons this is such an outstanding investment opportunity is that these amazingly low prices have not been inflated with man-made improvements. This is unspoiled virgin land, in a beautiful setting." (Underscoring added)

(c) A "newsletter" (Ex. 40L) which contained the following below a map of the area of Mohave County north of Kingman:

"The staff of Lake Mead Land and Water Co. earnestly hope that you will visit Lake Mead City at your first opportunity. However, you will be disappointed unless you realize that this virgin land is presently in its earliest stage of development, and you have indeed gotten in on the ground floor. Our future development plans call for markings of the different Lake Mead City

[13] The ranch foreman denied it was a swimming hole (RT 270, 271) although he admitted that to his own knowledge (with a schedule of 6:00 to night away from the ranch), his children had been in it six times (RT 290, 291).

areas. It is frankly difficult to find your way around right now. Please bear in mind that Rome was not built in a day, and the same for Lake Mead City. Even though you would not now identify your specific property, you would find the entire area abounds with beauty and clean healthful living. We feel that if someone sees the area now, and then returns in a year or two, he will be impressed with the changes.

"We have no offices in Kingman, but we have an information office on the Pierce Ferry Road, and it is open every day. To go by automobile from Kingman or Las Vegas, take U. S. Highway 93. 31 miles Northwest of Kingman (or 73 miles Southeast of Las Vegas), turn onto the Pierce Ferry Road, and continue 30 miles to our Office. Shopping facilities, including gasoline and groceries, have opened a few miles further down the road. For those who would like to stay overnight in their trailer, we have cleared an area adjacent to our Information Office.

Adjoining our Office, we have started construction of miles of roadway for our first developed Building Area. Additional Building Areas will be developed as needed. The first homes are scheduled to be completed shortly. If you decide to build in Lake Mead City, you would be given the opportunity at that time to transfer to a developed Building Area, should you so desire.

"Again, we hope to see you at Lake Mead City soon. Meanwhile, if you would like to order more good property, we suggest you rush your \$10 deposit to us." (Under-scoring added)

(d) A "land investment" sheet (Ex. 40M) which
read in part:

"Choice business property in PALM SPRINGS 90¢ A FRONT FOOT!

"In 1909, Nellie Coffman acquired land along Palm Canyon Drive in the heart of Palm Springs for less than 90¢ a front foot. She erected tents on the property and began providing overnight accommodations for travelers. Today, this same land is part of the site of Palm Springs' famous Desert Inn and is currently valued at \$2,000 a front foot!"

(e) The official Arizona State Highway Department 1962 road map (Ex. 40N) which mapped the northwest part of Arizona and is contained in Appendix "E" hereof.

(g) LM's Exchange Policy

LM maintained an exchange policy whereby a customer who had purchased in any of the ten units to and in which LM had not installed roads or staked lots or installed parcel identification markers, could trade for property in the improved Building Area (Unit 23-29-17) without extra cost, provided that such customer built within five years of the exchange (Stip. 1, par. 32, 33).

(h) LM's Refund Policy and LM's Refund Offer of April 29, 1963

LM had a refund policy whereunder: "If, for any reason" a customer changed his mind or was "not completely satisfied within 30 days, every cent" of his money was "returned without question" (Ex. Series 37, back page).

Additionally, on April 29, 1963, LM mailed to all of its customers a refund offer, with which LM strictly complied, making full refunds to any customer who complied with the terms of it and by granting extensions of time for customers to take advantage of such refund offer where a customer made timely request for such extension (Stip. 1, par. 27, 28). The offer referred to is set forth, in its pertinent parts, in Appendix "F" hereof.

(i) The Testimony of Customer Witnesses

(1) The Testimony of Government Customer Witnesses:

DON REED (RT 84-94; Ex. 13, 63, 64, 65, DD^[14]),

[14] Objection to this exhibit was sustained (RT 94). Defendant submits this was error. The court had previously admitted LM's letter of 11/12/62 (Ex. 65; RT 93) which was in reply to Ex. DD written by Reed's wife on 11/5/62. They read in sequence:

an Oregon newspaper publisher, in January 1962, read an LM coupon ad (See Ex. 36) and, like other LM customers (RT 96), mailed it to LM and received the LM brochure (Ex. Series 37) and fact sheet (Ex. Series 39). On the basis of these documents, he entered into his contract to purchase and made his first \$10.00 down payment, receiving back the Vicinity Map (Ex. Series 38) with his Unit shown and the appropriate plat map (Ex. Series 28) with his parcel shown. After paying \$67.41, Reed quit paying and was terminated (Ex. 65).^[15]

[14 cont'd]

Ex. DD: "* * * It seems time goes by so fast, we have changed our minds & we wish to inform you we no longer want our lot there.

"We are expecting our third child most any time now & Don's job has worked out real well here so we are going to stay here & buy our home.

"We feel this would be no time to move as our eldest child is in school now.

"So our lot & money is yours now. If we have any papers you wish me to return please inform me as I shall be happy to do so.

"We also feel if we should keep our lot & then want to resell it would be to hard as we live so far away.

"We hope there is no hard feelings & we thank you for all your kindness."

Ex. 65: "We understand that you wish to stop making payments on the above-captioned property and you wish to be relieved of any further obligation you have under the Agreement covering that property.

"This letter will serve as a Certificate of Credit in the amount of \$67.41 to be applied towards unsold property of equal or greater value at Lake Mead City, Arizona, any time within 12 months from this date. * * *"

[15] Because the items sent to the various customers and the sequence in which they were sent were essentially the same in all instances, no attempt will be made to set out these items and the sequence for each witness. Suffice to say that the procedure in every case was about the same as in the Reed transaction.

EMILIO D'AMICO (RT 94-99; Ex. 1, 16, 50),

from the Los Angeles area, read all the items that LM sent him and relied on *all* of these items in making his purchase (RT 97). He went out to the land in August of 1962. He received the refund offer (Ex. 50) in May, 1963, but never took advantage of it (RT 98); nor did he at any time ask for a refund (RT 99).

CLARENCE R. CORLEY (RT 99-106; Ex. 11, 12, 29, 66, 67), a Texas farmer, entered into contracts to purchase two parcels. On October 12, 1962, he wrote LM:

"I have been unemployed for some time due to a disability and hence I am considering selling my Lake Mead property.

"Would you please advise me of the manner in which this could be handled.

"Thank you." (Ex. 67)

LM replied on October 17, 1962:

"This is pursuant to your recent letter. Our entire time is taken with the business of subdividing and developing land. We are not real estate brokers, and we are not licensed to sell resales on behalf of others. * * *

* * * * *

"If you absolutely must sell now, perhaps you should advertise in your own local newspaper. * * * It is imperative that you keep your account in good standing, otherwise we would not accept an assignment of your Agreement to another party. * * * " (Ex. 66)

After this correspondence, Corley did not further communicate with LM; he had not seen the land in question (RT 106).

WILLIAM R. BLAND (RT 106-112; Ex. 3, 18, 19, 68, 69), a Missouri truck driver, contracted for 5 acres, went up to see the land but could not find it. He quit paying for the land because it was not what he thought it would be, but he never asked

or tried to get his money back. He did not finish paying for the land or inform LM that he was not going to pay (RT 109-110).

ANTHONY FELDMAN (RT 112-128; Ex. 70, 71, RR, SS), a San Francisco optician, who contracted for a parcel, visited it in August of 1962. He wrote LM:

"Just to let you know my wife and I took a look at 'Lake Mead City' and vicinity last August. We did not like what we saw. Too much desert to far from civilization, it will be many years befor it becomes a 'city' I'm afraid we will not live that long to see it. Best you give it back to the 'Indians'. We do not put all the blame on you, we are also to blame, because we now relize it is all ways best to see what you buy. We did not. It was your beautiful 'Brochure' that did the trick. Seeing the land is a different story.

"To make a long story short - we now have no desire to own property at so called 'Lake Mead City.' We shall make no more payments - Please dispose this property for us if you can, or what you think best." (Ex. 71)

LM replied with a certificate of credit (Ex. 70), which Feldman signed and returned (Ex. RR).

"We understand that you wish to stop making payments on the above-captioned property and you wish to be relieved of any further obligation you have under the Agreement covering that property.

"This letter will serve as a Certificate of Credit in the amount of \$323.49 to be applied towards unsold property of equal or greater value at Lake Mead City, Arizona, any time within 12 months from this date. * * *

* * * * *

"Please sign your acceptance on the original of this letter, then send it to us, together with your Sales Agreements and payment book. * * * " (Ex. 70)

Subsequently, on April 6, 1963, LM wrote him:

"We have received information from the Lake Mead City Information Office, that you or your representative visited Lake Mead City, prior to the termination of your account. You never reported any dissatisfaction to us, but we wonder if you were displeased with the location

of your property.[16]

"It is our sincere wish to count you among our many satisfied customers. We would be willing to furnish property in Lake Mead City Unit No. 23-29-17. This is our Building Area, and construction of owner-built homes is just now getting underway. Our Lake Mead City Information Office is also located in this Unit. All roads and stakes have been installed. Maps of the area are enclosed.

"Prices in this Unit are higher than the price of the property you were buying, but we would make the same amount of residential property available at the same low price you were paying. You would also receive full credit for your forfeited equity in your previous purchase.

"We hope you will accept this offer. If you like, you may first visit Lake Mead City at your convenience, and make your own selection of choice property."

Feldman did not respond (RT 127) and never requested a refund (RT 113). The court did not permit defense counsel to examine the witness concerning his purchase of two parcels of land in Lake Mojave Ranchos about the same time as the LM transaction (RT 115-123).

JOSEPH H. RODLER (RT 128-146; Ex. 4, 72, 73, 74, 75, 76, 77, VV, WW), a Missouri bank guard, wrote LM on January 23, 1963, that he was planning to visit the property (Ex. 75), and LM sent him information (Ex. 73). He was directed to his section (RT 132) over a rock and sand road (RT 134), and there being no stakes, he could not find his parcel (RT 134). On his return to Missouri, Rodler quit paying and requested a refund. LM responded on April 12, 1963:

"Thank you for writing us in regard to your dissatisfaction with your investment in undeveloped property.

"It is our sincere wish to count you among our many satisfied customers. We would be willing to furnish

[16] LM was mistaken as to this statement. LM, in sending this form letter, unquestionably overlooked Feldman's earlier letter (Ex. 71).

property in Lake Mead City Unit No. 23-29-17. This is our Building Area, and construction of owner-built homes is just now getting underway. Our Lake Mead City Information Office is also located in this Unit. All roads and stakes have been installed. Maps of the area are enclosed.

"Prices in this Unit are normally higher than the price of the property you were buying, but we would make the same amount of residential property available at the same low price you were paying. You would also receive full credit for your forfeited equity in your previous purchase.

"We hope you will accept this offer. If you like, you may first visit Lake Mead City at your convenience, and make your own selection of choice property.

"If you prefer, please feel free to now return your Sales Agreements and payment book for full refund. We very much want to count you among our many customers, but most of all we want you to be happy." (Ex. VV)

LM subsequently refunded Rodler in full (Ex. WW; RT 130).

ANN BENDER (RT 146-159; Ex. 5, 78, 79, 80, 81, 82) is a Riverside, California, customer. In early 1962, she went down to see the land (RT 151, 155, 156). On March 29, 1962, she wrote LM advising that she had heard "an injunction had been filed against" LM for lack of payments and that she was withholding further payments until advised (Ex. 80). LM responded, assuring that she would get good title (Ex. 79). She continued making payments (RT 156). Then on January 28, 1963, she wrote LM:

"I am writing this letter because I am quite concerned about my property at Lake Mead. There was an article in our paper last week which led me to believe that I am being swindled, and since then I have received a request from the Postal Authorities in Pueblo Colorado for all information I have about the property, also any advertising. I have a payment due now, but under the circumstances, I believe it would be wise to wait until I hear from you as to what this is all about.

"I shall be looking for an immediate & favorable reply." (Ex. 80)

On February 5, 1963, LM responded:

"Thank you for your nice letter of January 28, 1963.

We believe the enclosed printed item will answer your inquiry.

"We appreciate your understandable anxiety, and we have posted a note to your account, granting a fifteen (15) day extension on your payment due January 29, 1963." (Ex. 80)

Later, in May, 1963, she received the company's refund offer (RT 151). After that she continued her payments until she came to Phoenix in July, 1963 (RT 156, 157). She never asked for a refund, because "I didn't figure I'd get it, I guess." (RT 153)

ROBERT M. BALL (RT 161-174; Ex. 6, 83, 84, 85, 86, 87, YY) resided in Tucson and was a member of the U. S. Air Force. He contracted to purchase two parcels. He received the refund letter of April, 1963 (Ex. 50; RT 169) and, pursuant to its terms, visited the property (RT 170) and, almost three years after his purchase, had his money refunded in full (RT 170). Prior to the refund offer, he had received and returned to LM a questionnaire in which he said:

"I am satisfied with my investment in undeveloped property in the Lake Mead City subdivision. [x]

* * * * *

"Have you visited the Lake Mead City subdivision?
Yes [x] No [] If yes, when did you visit,
and what were your impressions?

"July 1961 - We found the subdivision to be as we had imagined." (Ex. YY)

The defendant's objections to government's exhibits 41 and 42 were overruled (RT 167-168).

JOHN R. BEAN (RT 175-181; Ex. 14, 88, ZZ, ZZ-1, ZZ-2), an insurance engineer from Pittsburgh, Pennsylvania, had never been in Mohave County. He contracted to purchase a

parcel, paid \$120.00 and then on March 22, 1963, wrote LM:

"Due to adverse publications in recent newspapers about land swindles in Arizona, I was wondering about the piece of property I am purchasing from you.

"I wrote to the Arizona Real Estate Department inquiring about your development and the answer is as quoted, 'Lake Mead Land and Water Company is at present engaged in considerable litigation and is having difficulty in its attempt to force Stewart Title Company to deliver deeds. This department has taken the position that Lake Mead Land & Water Company should not be permitted to advertise or sell sub-division lots until the matter is cleared up'.

"I also received a questionnaire from the United States Postmaster of Pueblo, Colorado asking me to send all documents pertaining to the parcel of land I am purchasing. There also was a questionnaire as to my impression of what I was purchasing, whether there were streets, water, electricity on the premises; distance of nearest cities and towns; what was promised in the future pertaining to the paving of streets, and the improving of property, etc.

"With all this in mind I find myself thinking that I have been (in plain English) 'rooked'. I would greatly appreciate it if I could be brought up to date on the developement and would like to have the answers to the following questions.

"Is this land out in the desert? Undeveloped?

"Is this developement laid out in lots with roadways passing in front of each lot that are improved or paved?

"What is the water situation?

"Is water to be piped to this sub-division in the near future or is there water that can be obtained from a water company?

"Could I move there at the present time?

"Would electricity be available to me immediately?

"What expense would I have to go through to have it brought to my premises?

"What is the distance from my lot to the nearest paved road?

"The distance from my lot to the nearest town?

"The distance to Lake Mead from my lot?

"How many people have actually built on the property and are currently residing?

"I would also like to have some references such as banks, etc. to whom I may correspond.

"I personally think that if there are not roadways to each and every lot and if electricity is not immediately available then this is nothing but open and barren land and it has been misrepresented to me.

"For the sum of money I am paying you, including the interest, I can purchase the equivalent amount of land on a paved street four miles from a town with a population of eight thousand people, having gas, water, and electricity.

"I am not in a position to go and inspect this land and fully depended upon the impression you gave me in your literature. If it is true what the real estate commission tells me, that there is litigation and titles and deeds cannot be delivered, then I am requesting you refund the money I have put into your venture." (Ex. 88)

LM responded on March 30, 1963:

"The property you purchased is undeveloped, and this is clearly stated in the color brochure you received before you purchased. However, we do not want you as an unhappy customer, and we therefore ask that you now return all your Sales Agreements and your payment book for full refund.

"You state in your letter that you can purchase 1-1/4 acres of good land on a paved street, with all utilities and near a town of 8,000 people, all for the same price of \$495. We don't dispute your statement, but we sincerely doubt that this could be done within hundreds of miles of our subdivision property. Certainly there is cheaper land, in other areas that have a less desirable climate and potential." (Ex. ZZ)

LM then refunded Bean's money in full (Ex. ZZ-1; RT 181).

CHESTER W. BINKLEY (RT 182-206; Ex. 8, 89, 90, 91, 92, 93, 50, 94, AAA, BBB, CCC, DDD), a Kansas railroad maintenance track foreman, contracted for three parcels. On October 27, 1961, LM, in response to Binkley's request for a 2-1/2 acre parcel wrote him in part:

"* * * One of the reasons this is such an outstanding investment opportunity is that these amazingly low prices have not been inflated with man-made improvements. This is true virgin land, in a beautiful setting.

* * * * *

"Please read the enclosed Fact Sheet for additional information." (Ex. 90)

This witness did not complete making payments on the land (RT 185).

He made one trip to the property (RT 193), which was in September, 1962 (RT 195). He testified that concerning the property:

"I couldn't see it. That lady at the office building where I had driven to advised me not to try to go to the land as we had two small children with us and we were in a hurry and I took her advice and left.

"She said she didn't think it would be advisable to go down, it was so hot and sandy. She did show me on the map that it was approximately seven miles from this place of their office building there to where we had purchased this property." (RT 186)

Later, on March 4, 1963, Binkley wrote LM:

"The two delayed payments are inclosed.

"We were holding up the payments due to the postal department calling for all our papers due to the transaction of the lots we are paying on; and due to some of the questions being asked, and some of the warnings we see in the papers we are wondering if we had made a mistake.

"We were as far to the property as your field office, and were informed there wasn't any streets to the property we are paying on; fact no water close to these lots.

"I would like to know how many people live in Mead City.

"How far is a road to the lots we are buying?

"Do all mineral rights stay with the title of these lots we are buying?

"Are you able to tell how deep a person would have to drill for water?

"Is the Pierce Ferry road going to be the main traveled road to the Lake Mead or is the street or road you have layed out for industrial development going to be on the main road to the lake?

"I am sorry we did not go on to look this place over, but not having time while we were at your field office we turned back; so this is the reason I am asking these questions." (Ex. AAA)

On March 12, 1963, LM responded:

"Thank you for your nice letter of March 4, 1963. We find that on October 21, 1961 you wrote us a letter which asked very much the same questions. We sent a lengthy answer together with a fact sheet on October 27, 1961, and you purchased in November of 1961.

"At the present time there are two permanent resi-

dents on our subdivision property. It is premature to expect much construction at this early stage, because most people have not yet had enough time to pay for their land. However, several buyers are right now clearing their land, and have informed us they will build this summer.

"A ranch road, suitable for four wheel drive vehicles, passes through Unit 19-30-16, almost midway between your two locations. This road is approximately one-quarter mile from your properties.

"As outlined in the material we sent you before your purchase, mineral rights throughout our large area are owned by the Santa Fe Railroad Company. Expert opinion holds that the true wealth in this location is not the minerals below the ground, but the excellent climate and scenery above the ground. We would frankly doubt that there are minerals of any value beneath these lands.

"Clearwater Well is 1-1/2 miles north of your property, as shown on your Vicinity Map. This well has good water at a depth of less than 150 feet. This should serve as a rough guide to you, in estimating the depth to water in your location. However, no one could tell in advance of drilling just exactly how far down the water is in any location.

* * * * * (Ex. 91)

Subsequently, he received the company's questionnaire (Ex. 94), which he refused to make out (RT 189, 190), and later he received the refund offer of April 29, 1963 (Ex. 50; RT 190). Thereafter, and until July 2, 1963, he continued to make payments (Ex. CCC, DDD) but at no time sought to comply with the terms of the refund offer (RT 203) even though he went to Phoenix in July, 1963 (RT 203). He stopped making payments only when he came to testify before the Grand Jury (RT 204). Later, he *wrote* for a refund and received this reply from LM:

"Thank you for your recent letter. We regret that because of a heavy workload, we were unable to reply sooner. Our records show that you received a detailed Fact Sheet before your order was accepted. This Fact Sheet clearly set forth the virgin, undeveloped nature of Lake Mead City properties. Thereafter, you completed your purchase for such undeveloped property.

"Since you first contacted this company, we have repeatedly emphasized the undeveloped nature of the

property you are buying. As an example, we refer you to letters we sent you on October 27, 1961, December 6, 1961, January 4, 1963, March 12, 1963 and April 29, 1963.

"As you indicated in your letter, you both visited Lake Mead City in September, 1962, which is almost one year ago. You did not write us one adverse comment after your visit, and you continued your payments on both purchases without complaints of any type.

"There is nothing in your file that would indicate any justification for a refund. Yours has always been an honored account, and we hope you will see fit to continue with your investment." (Ex. 92)

FRANK A. LEONARD (RT 206-213; Ex. 7, 95, 50,

EEE, 96,FFF) was a retired Colorado rancher who had never seen the land. Just prior to trial time he had finished paying for his parcel (RT 208, 209). He received the refund offer of April 29, 1963 (RT 211) but never took advantage of it although he was in Phoenix in July of 1963. His sole complaint to the LM (RT 212) was embodied in his wife's letter of July 8, 1963:

"My husband, Frank A. Leonard, has been subpoenaed - to appear at a Grand Jury Hearing - next Monday July 15th at Phoenix, Arizona - concerning you & your Company. Fraud? Or what is it? We had faith that your Company would not be found to be crooked. But we must have been wrong all the way. To keep our account with you in record standing - here is another check for Ten Dollars (\$10.00). If all is not okay with you folks - we want all of our money back - by return mail. So far we will have paid you folks - the sum of Two - Hundred and Thirty dollars (with this check of Ten dollars included): \$230.00 on our Land Purchase. -

"Please return our money promptly - so we won't have to employ a lawyer to collect - with his fees added." (Ex. EEE)

LM responded to this letter as follows:

"* * * Our records show that you received a detailed Fact Sheet before you ever mailed any money to this company. This Fact Sheet clearly set forth the virgin, undeveloped nature of Lake Mead City properties. Thereafter, you placed your order for such undeveloped property.

"Since that time, we have repeatedly emphasized the undeveloped nature of the property you are buying. As

an example, we refer you to the letters we sent you on November 9, 1961, February 17, 1962, January 8, 1963, and April 29, 1963.

"There is nothing in your file that would indicate any justification for a refund. Yours has always been an honored account, and we hope you will see fit to continue with your investment." (Ex. 95)

HARRY E. OLDFIELD (RT 226-235; Ex. 7, 97, 98, 99, 100, 101, 102, III), a retired Pittsburgh automobile mechanic, contracted in March of 1962, made eight payments, and stopped paying. He was near the property en route to Las Vegas on Highway 93 in 1963; he never asked for a refund. On July 31, 1962, he wrote LM:

"I have contacted all my children, and they have informed me, they don't care about property in the west, in which I bought or am buying it for them.

"So at my age nearing 65 I own my property here and don't intend to leave. So if some one wants to have my lot they can at no extra cost to them.

"If you find a buyer let me know and I will sign the necessary papers." (Ex. 101)

LM replied:

"This is pursuant to your recent letter. Our entire time is taken with the business of subdividing and developing land. We are not real estate brokers, and we are not licensed to sell resales on behalf of others.

* * * * *

"If you absolutely must sell now, perhaps you should advertise in your own local newspaper. * * *" (Ex. 100)

Subsequently, on January 3, 1963, Oldfield wrote again:

"I do not think you have done the right thing in putting my property in the hands of a small loan company. I am paying about 36% interest instead of the 6% you have in your yellow paper agreement.

"Line (1) 'one' says I pay 6% per year on the unpaid balance.

"So I do not intend to pay that high interest, So I guess I am stuck for my money, hope you get rich real quick, but on some other sucker, like me.

"Thanks for your honesty.

" * * *

"P.S. If I knew your Better business Bureau, I would write & see who is right or wrong. Maybe our Government can do something."

LM replied:

"* * * First of all, we have not put your account in the hands of a small loan company. We handle all accounts ourselves. You deal with only one company, throughout your transaction. We own the land, we subdivided the land, we sell the parcels, and we collect all the payments. After payment in full, we issue the Deed.

"Your interest has always been strictly computed at the rate of 6% per year, which is 1/2% per month on the reducing unpaid balance. * * *

"We would be grateful if you would take your payment book to an attorney, or to your local bank. Ask them if we have charged you too much interest, or if we only charged you 6% as promised. If any banker says we charged over 6% interest, have him write us a letter and we will refund all your money. * * *" (Ex. 102)

FLORENCE JOHNSTON (RT 235-241A; Ex. 103, 103A,

103B) was a non-customer witness from Oxnard, California, who, in October of 1962, went to look at the property before she made a purchase. She claimed she could not get up the Pierce Ferry road beyond 11 miles (RT 238-241). She did not see the Lake Mohave Ranchos project (RT 241A).

ANDY K. MECCHI (RT 241A-247A; Ex. 104, 2, 15,

17, 105, 50) is a California refrigeration installation man, whose land went to his wife in a divorce settlement. He had completed making his payments (RT 244-245). He never went to see the land (RT 245-246). He received both LM's questionnaire and refund offer (Ex. 50), and although he was in Phoenix in July of 1963 (RT 247), he did not go up to the property to take advantage of the refund offer (RT 247).

(2) The Testimony of Defendant's Customer Witnesses:

COL. LYMAN P. DAVIDSON (RT 421-438), a retired Air Force (OSI) Colonel, bought and paid for his parcel and received a deed. He received the refund offer of April 29, 1963 (RT 423, 424). He visited the land in 1961 and in mid-1963 (RT 424). He paid \$395 for his parcel and at trial time believed it was worth \$595 and would maintain this estimate of value even if he was wrong as to where water was located (RT 433). He believes his land to be very beautiful (RT 427-428).

MRS. JACK HUMMEL (RT 496-518; Ex. 6D-60), with her husband, lives at Lake Mead City in the Building Area, having bought the Haines home, for cash, in April of 1965 (RT 496, 497). The price, for cash, was the precise amount Haines had invested in the house and land (RT 499). Subsequent to their purchase, they sold one-half of their parcel (the undeveloped half of their 1-1/4 acres) for \$355 cash. She described how her city-like home is serviced by butane and a diesel plant (RT 503). The altitude and climate were good for her husband's heart condition. Again, the defense was not permitted to examine the witness concerning Lake Mohave Ranchos (RT 504-505).

HOWARD P. SWEENEY (RT 547-556; Ex. 6S), an Everett, Washington, police captain, purchased in 1961 after viewing the property (RT 548). He visited the land in early 1961 and again in April of 1963 (RT 549). He traded into the Building Area parcel at an additional cost of \$300 (RT 551), because he knew the unit in which his original purchase was located would not

be developed very soon (RT 550). The witness testified as to certain improvements which had been made in the area subsequent to his purchase (RT 553).

BETTY RUSSELL (RT 556-563; Ex. 6T), a Pasadena legal secretary and former police reporter, visited the property in 1961 (RT 556). In 1964, she traded, in order to be able to build immediately (RT 558), for property located in the Building Area. She traded for two parcels at \$695 each (RT 558-560); those parcels were worth \$1,000 each at the time of trial (RT 563). She talked her sister into buying a parcel, because she liked her land very much (RT 558-559).

THOMAS LINCOLN (RT 576-581), an Illinois accountant, bought a parcel in 1961 for \$495 (RT 576-577) and visited the land three times: in December of 1961, July of 1962, and February of 1963 (RT 578). He bought a second parcel after his second visit, for \$595 (RT 577). He would not sell his parcels for what he paid for them (RT 579).

ETTA MITCHELL (RT 582-607; Ex. 7F-7J) is the wife of a retired Marine Master Sergeant, who became LM's on-site manager in June, 1964 (RT 582). They bought a parcel in 1961 (RT 583) and, after visiting in June of 1963, traded it against two of the more expensive parcels in the Building Area, where they were building their home as of the time of trial (RT 585). The witness obtains her water from a storage tank at the well. The residents of Lake Mohave Ranchos and Meadow View subdivisions do not have piped water either; the people residing at both of these subdivisions obtain their water by hauling it (RT 594-596).

OTIS R. McDONALD (RT 607-610), a Washington mining engineer, purchased two parcels for \$1,000 in 1961 and visited the land in 1962. He paid for his parcels in full (RT 609).

DELMER J. MEYER (RT 615-618), a Post Office foreman of mails at La Habra, California, visited the Building Area in September of 1963 and bought a commercial parcel for \$1,395, which is now worth \$2,500. He saw his property before he purchased it. He was, at time of trial, making payments on his property.

(3) The Location of Parcels Purchased By
Customer Witnesses:

Appendix "B" hereto illustrates the section of property owned by LM in Mohave County, Arizona. Appendix "G" sets forth the description and location of parcels purchased by both government and defense witnesses. Appendix "G" also contains information regarding the individual purchases.

STATUTE INVOLVED

Title 18, U.S.C., Sec. 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sec. 34, 63 Stat. 94."

SPECIFICATION OF ERROR

- I. THE EVIDENCE PROCURED BY THE GOVERNMENT AND INTRODUCED INTO EVIDENCE WAS ILLEGAL, IN THAT:
 - A. It Was The Product Of An Illegal "Mail Watch," In Violation of Amendments IV and IX, United States Constitution.
- II. APPELLANT'S MOTION TO DISMISS INDICTMENT OR, ALTERNATIVELY, MOTION FOR DISCLOSE OF MINUTES OF GRAND JURY AND MOTION TO DISMISS INDICTMENT ON THE BASIS OF DISCLOSURE SHOULD HAVE BEEN GRANTED (CT 30-35).

The first of these is the fact that the human race is not a homogeneous mass, but is divided into many distinct groups, each with its own characteristics. These groups are known as races, and they are distinguished from one another by their physical and mental traits. The second fact is that these races have not remained stationary, but have changed and developed over time. This is due to a variety of factors, including migration, interbreeding, and environmental influences. The third fact is that the human race is a single, unified entity, despite its diversity. This is because all races share certain common characteristics, such as the capacity for reason and the ability to create culture.

The study of the human race is a complex and fascinating task, and it is one that has attracted the attention of many scholars. In the past, the study of the human race has been dominated by the study of physical traits, such as skull shape and stature. However, in recent years, there has been a growing interest in the study of mental traits, such as intelligence and personality. This is because it is now recognized that the human mind is just as important as the human body in determining who we are.

The study of the human race is also a very practical task, because it helps us to understand ourselves and our place in the world. By studying the human race, we can learn about our own origins and our own future. We can also learn about the differences between different groups of people, and we can learn how to live together in harmony.

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III. THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT, ON THE

FOLLOWING GROUNDS, SHOULD HAVE BEEN GRANTED:

- A. The Indictment Failed to State an Offense Against
The United States.
- B. The Great Bulk of Allegedly Fraudulent Statements
Attributed To The Appellant In The Indictment
Were No More Than "Seller's Talk" or "Puffing,"
Which Is Not Violative of 18 U.S.C. Sec. 1341.
- C. The Concealments Or Omissions In Advertising Attributed To The Appellant Were Not Criminal Under
18 U.S.C. Sec. 1341, Especially Since The Appellant Was Charged, In Some Instances, With Merely
Not "Clearly Revealing" Certain Facts.
- D. There Were No Allegations In The Indictment That
Someone Was Defrauded.
- E. Inadequate Evidence Was Presented To The Grand Jury
To Sustain An Indictment.
- F. If The Indictment Stated An Offense Under 18 U.S.C.A.
1341, then 18 U.S.C.A. 1341 And The Indictment
Returned Against Appellant Were Unconstitutional
As Not Providing Any Ascertainable Standard
Of Guilt.

IV. APPELLANT'S MOTION TO DISMISS INDICTMENT, ON THE GROUND EACH

COUNT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES
AND EACH COUNT WAS DUPLICITOUS, SHOULD HAVE BEEN GRANTED
ON THE FOLLOWING GROUNDS:

A. Each Count Failed To State Facts Sufficient To Con-
stitute An Offense Against The United States.

B. Each Count Of The Indictment Was Duplicitous.

V. THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE FOLLOWING
PRETRIAL MOTIONS MADE BY THE APPELLANT:

A. Motion For Discovery And Inspection Of Documents

(CT 59, *et seq.*).

B. Motion For Bill Of Particulars (CT 76, *et seq.*).

VI. THE INDICTMENT IN WHICH THE APPELLANT WAS CHARGED WAS INVALID
AND VOID, IN THAT IT CHARGED CONDUCT WHICH WAS PROTECTED
BY THE FIRST AMENDMENT, UNITED STATES CONSTITUTION.

VII. THE COURT COMMITTED PREJUDICIAL ERROR IN MISINTERPRETING AND
NOT AFFORDING TO THE APPELLANT THE PROTECTION OF THE
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN
THAT:

A. The Evidence Was Insufficient As A Matter Of Law

To Overcome The Presumption Of Innocence Which

Surrounds A Defendant In Every Criminal Proceeding.

B. No Specific Wrongful Intent Was Present As Is Required

By 18 U.S.C. Sec. 1341 and Which Intent Can Never

Be Presumed.

C. The Undeniable Good Faith Exhibited By The Appellant

Was A Complete Defense To A Charge Of Violating

18 U.S.C. Sec. 1341.

D. Appellant Was Found Guilty Under An Indictment And

Statute Which Did Not Contain Any Ascertainable

Standard Of Guilt.

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E. The Government Failed To Prove Anyone Was Defrauded

By The Appellant's Alleged Misconduct.

VIII. THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND REFUSING TO ADMIT THE FOLLOWING EVIDENCE:

A. Evidence Of Value.

B. Evidence Of Standards Of The Industry And Related Values.

C. Opinion Evidence.

D. Other Errors And Excluding Evidence.

IX. DEFENDANT'S CONVICTION MUST BE REVERSED FOR THE REASON THAT HE WAS DEPRIVED OF EFFECTIVE REPRESENTATION OF COUNSEL, IN VIOLATION OF AMENDMENT VI, UNITED STATES CONSTITUTION.

OUTLINE OF APPELLANT'S ARGUMENT
AND PRELIMINARY CASE AUTHORITY

I

THE EVIDENCE PROCURED BY THE GOVERNMENT AND INTRODUCED INTO EVIDENCE WAS ILLEGAL, IN THAT:

A. It Was The Product Of An Illegal "Mail Watch," In Violation Of Amendments IV and IX, United States Constitution.

1. Introductory Statement. This issue was raised by the appellant in a pretrial motion to suppress evidence (CT 72-74), supported by defense counsel's affidavit (CT 85, 88-89). Although the record is not clear, it appears (a) allegations in appellant's affidavit were not refuted by the government, and (b) it is appellant's recollection that the "mail watch" was admitted by the government during the course of the proceedings herein. This

latter statement is made on information and belief, since there is apparently no transcript of these proceedings.

2. Preliminary Case Authority. A "mail watch" is a violation of the Fourth Amendment (search and seizure) and the Ninth Amendment (right to privacy) to the United States Constitution. *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652; *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *In the Matter of Jackson*, 96 U.S. 727, 24 L. Ed. 877, 23 Wallace 877 (first-class mail entitled to protection under the right to privacy); *Oliver v. United States*, 239 F. 2d 818; and *Griswold v. Connecticut*, 381 U.S. 479, 85 Sup. Ct. 1678, 14 L. Ed. 2d 510; and is a violation of the United States Statutes and Post Office regulations - 18 U.S.C. Sec. 1703; 39 C.F.R., subchapter A-1, part 3 (regulations Post Office Department).

II

APPELLANT'S MOTION TO DISMISS INDICTMENT OR, ALTERNATIVELY,
MOTION FOR DISCLOSE OF MINUTES OF GRAND JURY AND
MOTION TO DISMISS INDICTMENT ON THE BASIS OF DISCLOSURE
SHOULD HAVE BEEN GRANTED (CT 30-35).

1. Introductory Comment. Prior to trial, the appellant moved to dismiss the indictment or, alternatively, for disclosure of the Minutes of the Grand Jury. This motion was supported by affidavit of defense counsel (CT 33-35) based upon information obtained from the public records in the office of the United States District Court Clerk or advice from government witnesses. Since appellant was not seeking the names of Grand Jurors, or of the

manner in which each Grand Juror voted, but was only questioning the action of the Grand Jury taken as a body, appellant's motion should have been granted. This is especially so since defense counsel's affidavit seriously questioned the validity of the Grand Jury's action in indicting the appellant.

2. Preliminary Case Authority. *Abbott v. Superior Court of Pima County*, 86 Ariz. 309, 345 P. 2d 776; *United States v. Thompson*, 144 F. 2d 604, Cert. denied, 323 U.S. 790, 65 Sup. Ct. 313, 89 L. Ed. 630. Compare: *United States v. Armour*, 214 F. Supp. 123.

III

THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT, ON THE FOLLOWING GROUNDS, SHOULD HAVE BEEN GRANTED:

A. The Indictment Failed To State An Offense Against The United States.

1. Introductory Comment. The indictment was defective as a matter of law, in that:

(a) It did not contain the elements of the offense intended to be charged.

(b) It did not sufficiently apprise the appellant of what he had to be prepared to meet.

(c) It was not sufficiently definitive in its terms to pinpoint with accuracy the extent to which a defendant may plead a formal acquittal of conviction.

(d) It did not set out the offense with sufficient specificity as to inform the court of the facts alleged, so that

it might decide whether they are sufficient in law to support a conviction.

2. Preliminary Case Authority. *Russell v. United States*, 369 U.S. 749, 82 Sup. Ct. 1038, 8 L. Ed. 2d 240.

B. The Great Bulk Of Allegedly Fraudulent Statements Attributed To The Appellant In The Indictment Were No More Than "Seller's Talk" or "Puffing," Which Is Not Violative of 18 U.S.C. Sec. 1341.

1. Preliminary Case Authority. *Harrison v. United States*, 200 F. 2d 662; *United States v. Rabinowitz*, 327 F. 2d 62.

C. The Concealments Or Omissions In Advertising Attributed To The Appellant Were Not Criminal Under 18 U.S.C. Sec. 1341, Especially Since The Appellant Was Charged, In Some Instances, With Merely Not "Clearly Revealing" Certain Facts.

1. Preliminary Case Authority. *United States v. Kram*, 247 F. 2d 830; *United States v. McNamara*, 91 F. 2d 986; *Epstein v. United States*, 174 F. 2d 754; *Stubbs v. United States*, 249 Fed. 571; *Charles v. United States*, 213 Fed. 707; *Williams v. United States*, 278 F. 2d 535; *Haid v. United States*, 157 F. 2d 630; *Gregory v. United States*, 253 F. 2d 104; *Kreuter v. United States*, 218 F. 2d 532; *Linden v. United States*, 254 F. 2d 560; *Silverman v. United States*, 213 F. 2d 405; *Cacy v. United States*, 298 F. 2d 227.

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D. There Were No Allegations In The Indictment
That Someone Was Defrauded.

1. Preliminary Case Authority. *Fushay v. United States*, 68 F. 2d 205; *United States v. Brown*, 79 F. 2d 321; *United States v. Rabinowitz, supra*, 327 F. 2d 62; *United States v. Barren*, 305 F. 2d 527; *United States v. Brunet*, 227 F. Supp. 766; *Moser v. New York Life Insurance Company*, 151 F. 2d 396; *Schlaadt v. Zimmerman*, 206 F. 2d 282; *Kern Copters, Inc. v. Allied Helicopter Service, Inc.*, 277 F. 2d 308.

E. Inadequate Evidence Was Presented To The
Grand Jury To Sustain An Indictment.

1. Introductory Comment. A bona fide promise, which was present in the instant case (Exhibit F) and presented to the Grand Jury, to return money obtained as a result of the alleged misleading advertising was made by LM and negated any charge of fraud which the false advertising would otherwise have supported.

2. Preliminary Case Authority. *Harrison v. United States, supra*, 200 F. 2d 662; *Jeffries v. Olesen*, 121 F. Supp. 463. And good faith is a complete defense to a mail fraud indictment. *Gold v. United States*, 36 F. 2d 16; *Walters v. United States*, 256 F. 2d 840.

F. If The Indictment Stated An Offense Under 18 U.S.C.A. 1341, then 18 U.S.C.A. 1341 And The Indictment Returned Against The Appellant Were Unconstitutional As Not Providing Any Ascertainable Standard Of Guilt.

1. Introductory Comment. If, as a matter of law, the indictment returned against the appellant stated an offense under 18 U.S.C.A.

Sec. 1341 and a "scheme to defraud" could be found to be present without there having been proved any "actual misrepresentation of fact," that the scheme "succeeded" or that anyone was defrauded or sustained a loss as a result of the scheme, then the indictment provided no ascertainable standard of guilt. This is all the more true when it is considered that the court merely accepted that what was *not* said by the appellant constituted "concealment" or that most gullible persons would misread what was contained in the material promulgated by the appellant and his company.[17]

2. Preliminary Case Authority. *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 Sup. Ct. 518, 15 L. Ed. 2d 447; *Winters v. United States*, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840; *Musser v. Utah*, 333 U.S. 95, 68 Sup. Ct. 397, 92 L. Ed. 562; *Connally v. General Construction Co.*, 269 U.S. 385, 46 Sup. Ct. 126, 70 L. Ed. 322; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516; *United States v. DeCadena*, 105 F. Supp. 202.

[17] At and prior to the time of the indictment returned against the appellant, extensive congressional hearings were in progress and the Post Office Department pointed with considerable pride to the indictment of the defendant in connection with the Lake Mead project. The publicity that attended the indictment of the defendant can hardly be overemphasized, nor was it possible for that publicity to have not affected the trial judge. *Giles v. Maryland*, ___ U.S. ___, ___ Sup. Ct. ___, 17 L. Ed. 737; *Sheppard v. Maxwell*, 384 U.S. 333, 86 Sup. Ct. 1507, 16 L. Ed. 2d 600.

Parenthetically, it shall be stated that it is apparent from the judge's conduct and remarks that he had (1) arrived at an opinion as to the appellant's guilt prior to trial; and (2) had in mind the fact that there was litigation over title to the land. This conclusion necessarily follows from the fact that the trial judge was very aware of the title difficulties in which Lake Mead was embroiled at the time of trial. It should be noted, however, that Lake Mead (LM) has settled all of its title disputes at a cost of approximately \$250,000.00 and has delivered full and complete clear legal title to all land purchasers.

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APPELLANT'S MOTION TO DISMISS INDICTMENT, ON THE GROUND EACH COUNT FAILED TO STATE AN OFFENSE AGAINST THE UNITED STATES AND EACH COUNT WAS DUPLICITOUS, SHOULD HAVE BEEN GRANTED ON THE FOLLOWING GROUNDS:

A. Each Count Failed To State Facts Sufficient To Constitute An Offense Against The United States.

1. Introductory Comment. 18 U.S.C.A. Sec. 1341 reads in part:

"Whoever . . . places in any post office or authorized depository for mail . . . "

Each of the counts of the indictment are alleged in identical terms, to wit:

"On or about (date) for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendant *placed* or *caused to be placed* in an authorized depository for mail at Phoenix, within the State and District of Arizona, a letter addressed to (name and address) to be sent and delivered by the Post Office Department of the United States, in violation of 18 U.S.C. 1341." (Emphasis added.)

2. Preliminary Case Authority. 18 U.S.C. 1341 covers only fraud in which use of the mail is a "part of the execution of the fraud," is "incident to an essential part of the scheme" or "for the purpose of executing the scheme." *Parr v. United States*, 363 U.S. 370, 80 Sup. Ct. 1171, 4 L. Ed. 2d 1277. Appellant was *not* charged, in the words of the statute, with having "placed" the matter. Nor was the appellant charged with having "*willfully*" caused the matter to be placed, which would be sufficient under the PRINCIPALS STATUTE, 18 U.S.C.A. Sec. 2(b), as amended, which provides:

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"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." (Underscored word added by 1958 amendment.)

Thus, by the government's alternative allegation in the one paragraph of each count, which under *Parr* would invoke the mail fraud statute, appellant was not charged with the commission of any crime at all, and the indictment should have been dismissed.

Finally, in determining queries arising from the insufficiency of the allegations, the indictment must be construed in the manner most favorable to the defendant. *Johnson v. United States*, 95 F. 2d 813.

B. Each Count Of The Indictment Was Duplicitous.

1. Introductory Comment. After its revision in 1948, the mail fraud statute in effect charged three separate crimes:
 - (a) To devise a scheme or artifice to defraud;
 - (b) To devise a scheme to obtain money or property by false or fraudulent pretenses, representations, or of promises; and
 - (c) To devise a scheme to sell, dispose of, or loan counterfeit or spurious money.

Each count of the indictment charged the appellant with violation of two of these crimes:

"That Marvin Lustiger, hereinafter referred to as the 'defendant', devised and intended to devise a scheme and artifice to defraud *and* for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons" (Emphasis added.)

Therefore, appellant respectfully submits that the indictment, and each count thereof, was duplicitous and should have been dismissed.

2. Preliminary Case Authority. An indictment is void for duplicity when, contrary to Rule 8(a) FRCrP, it charges two separate offenses in one count. *Empire Oil and Gas Corp. v. United States*, 136 F. 2d 868; *United States v. Martinez-Gonzales*, 89 F. Supp. 62. Appellant recognizes that Form 3 (FRCrP App.) seemingly sanctions such duplicity in that there are cases that reject the contention as to duplicity as herein made. See, *e.g.*, *United States v. Culver*, 224 F. Supp. 419.

V

THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE FOLLOWING PRETRIAL MOTIONS MADE BY THE APPELLANT:

A. Motion For Discovery And Inspection Of Documents (CT 59, *et seq.*).

1. Preliminary Case Authority. *Brady v. Maryland*, 373 U.S. 83, 83 Sup. Ct. 1194, 10 L. Ed. 2d 215; *United States ex rel Almeida v. Baldi*, 195 F. 2d 815; *Barbee v. Warden, Maryland Penitentiary*, 331 F. 2d 842; *United States v. Wilkins*, 326 F. 2d 135.

B. Motion For Bill Of Particulars (CT 76, *et seq.*)

1. Preliminary Case Authority. *Williams v. United States*, 289 F. 2d 598; *Yeargain v. United States*, 314 F. 2d 881; *United States v. Solomon*, 26 F.R.D. 397.

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THE INDICTMENT IN WHICH THE APPELLANT WAS CHARGED WAS INVALID AND VOID, IN THAT IT CHARGED CONDUCT WHICH WAS PROTECTED BY THE FIRST AMENDMENT, UNITED STATES CONSTITUTION.

1. Introductory Comment. In framing its indictment, the government took portions of statements contained in appellant's advertising brochures and, based thereon, alleged a "scheme to defraud." It is submitted that portions of appellant's advertising cannot be taken out of context and the appellant charged with a fraudulent scheme based upon such portions alone. The gravamen of the offense of which the appellant was charged was a "scheme to defraud." Surely, the entire advertising brochures, and not just portions thereof taken out of context, must be examined in order to determine whether or not, in fact, a "scheme to defraud" was present. To take a portion of the advertising out of context violated appellant's First-Amendment rights (freedom of speech).

2. Preliminary Case Authority. The principle here under discussion exists in other First-Amendment areas, *e.g.*, obscenity. Thus, a book must be read in its entirety to determine whether it is obscene; portions may not be taken out of context. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185, affirmed 72 F. 2d 705. Further, the United States Supreme Court in *Roth v. United States* and *Alberts v. California* (decided together) 354 U.S. 476, 77 Sup. Ct. 1304, 1 L. Ed. 2d 1498, approved of the "*Ulysses*" decision and set forth the constitutionally acceptable

definition that the "dominant theme" taken as a whole, must appeal to the prurient interest for a matter to be obscene. See also *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413, 86 Sup. Ct. 975, 16 L. Ed. 2d 1; *Ginzberg v. United States*, 383 U.S. 463, 86 Sup. Ct. 942, 16 L. Ed. 2d 31; *Mishken v. New York*, 383 U.S. 502, 86 Sup. Ct. 958, 16 L. Ed. 2d 56. It is submitted that fraudulent statements, like obscene literature, are not constitutionally protected. But to lose the cloak of constitutional protection, a statement must clearly be fraudulent. It is submitted that the statements attributed to the defendnat herein were not of such a nature that the First Amendment's protections should have been lost. Finally, where First-Amendment protections are involved, there is a presumption that a statute under attack is unconstitutional.

VII

THE COURT COMMITTED PREJUDICIAL ERROR IN MISINTERPRETING AND NOT AFFORDING TO THE APPELLANT THE PROTECTION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THAT:

A. The Evidence Was Insufficient As A Matter of Law To Overcome The Presumption Of Innocence Which Surrounds A Defendant In Every Criminal Proceeding. [18]

1. Preliminary Case Authority. *Fleischman v. United States*, 339 U.S. 349, 70 Sup. Ct. 739, 94 L. Ed. 906; *Griffin v. California*,

[18] Where, in the outline of appellant's Argument and Preliminary Case Authority, appellant states that the evidence was insufficient as a matter of fact and law to sustain a conviction, appellant also desires to assert as error the denial by the court of his Motion for Judgment of Acquittal, Motion in Arrest of Judgment and Motion for new trial.

380 U.S. 609, 85 Sup. Ct. 1229, 14 L. Ed. 2d 1206; *Wilson v. United States*, 149 U.S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650; *Colt v. United States*, 158 F. 2d 641; *United States v. Bennett*, 152 F. 2d 342; *Boatwright v. United States*, 105 F. 2d 737; *Kaplan v. United States*, 329 F. 2d 561; *State v. Levy*, 113 P. 2d 306 (Wash.); *People v. Hill*, 175 P. 2d 45 (Cal. App. 1946); *Holland v. Commonwealth*, 55 S.E. 2d 437 (Va.)

B. No Specific Wrongful Intent Was Present As Is Required By 18 U.S.C. Sec. 1341 And Which Intent Can Never Be Presumed.

1. Preliminary Case Authority. *Williams v. United States*, 278 F. 2d 535; *Morissette v. United States*, 342 U.S. 246, 72 Sup. Ct. 240, 96 L. Ed. 288.

C. The Undeniable Good Faith Exhibited By The Appellant Was A Complete Defense To A Charge Of Violating 18 U.S.C. Sec. 1341.

1. Preliminary Case Authority. *Gold v. United States*, *supra*, 36 F. 2d 16; *Walters v. United States*, 256 F. 2d 840, *supra*.

D. Appellant Was Found Guilty Under An Indictment And Statute Which Did Not Contain Any Ascertainable Standard Of Guilt.

1. Preliminary Case Authority. *Giaccio v. Pennsylvania*, *supra*, 382 U.S. 399, 86 Sup. Ct. 518, 15 L. Ed. 2d 447; *Bowie v. Columbia*, 378 U.S. 347, 84 Sup. Ct. 1697, 12 L. Ed. 2d 894.

E. The Government Failed To Prove Anyone Was Defrauded By The Appellant's Alleged Misconduct.

1. Preliminary Case Authority. *United States v. Rabinowitz*, *supra*, 327 F. 2d 62; *United States v. Barren*, *supra*, 305 F. 2d 527;

United States v. Brunet, *supra*, 227 F. Supp. 776; *United States v. Schwartz*, 230 F. 2d 537.

VIII

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND REFUSING TO ADMIT THE FOLLOWING EVIDENCE:

A. Evidence Of Value.

1. Introductory Comment. At the trial of the instant case, while the court permitted evidence of value from customer witnesses (RT 428, 506, 553, 562, 617), it excluded evidence of value from Smith, the at-the-moment-and-in-effect complete owner of all of the lands in question (RT 219). The evidence by way of offer of proof was that the land was worth \$595.00 per acre in its present condition without roads (RT 221). In addition, the court excluded evidence of the \$495.00 sale price (Ex. 5V, 5W, 5X; RT 459-461) for 50' by 112' lots just outside Kingman, Arizona (RT 566). This amounted to approximately \$3,960.00 per acre.

2. Preliminary Case Authority. *Farrell v. United States*, 321 F. 2d 409; *United States v. Bloom*, 237 F. 2d 158.

B. Evidence Of Standards Of The Industry And Related Values.

1. Introductory Comment. On trial, the court excluded the compendia of ads and promotional materials of competitor Mohave County and western subdividers used during the period charged in the indictment (RT 573, 575). These consisted of:

Exhibit E: A compendium of ads and promotional materials used at the same time by competitor Mohave County subdividers, to wit, Lake Mohave Ranchos, Lake

Mead Ranchos, Meadview, Golden Valley and Paradise Acres, etc. (supplemented by Ex. BB-2 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of Paradise Acres).

Exhibit CC: A collection of Mohave County publications at the same time showing ads of Mohave County competitors of LM.

Exhibit F: A compendium of ads and promotional materials used, at the same time, by competitor western land subdividers, to wit, Horizon City, Texas, and Rio Grande Estates, New Mexico (as supplemented by Ex. BB-3 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of these subdivisions).

At the trial, the court also excluded evidence of the small-tract offerings of the Federal Bureau of Land Management in Arizona and California during the same period (RT 572, 575). It cannot be overemphasized that these proffered exhibits consisted of advertising promulgated by a governmental agency under standards which undoubtedly were approved by the United States Government. In light of this fact, it might even be wondered if the United States Government was not estopped to assert that the appellant engaged in misconduct in his advertising, when that advertising went no further than that of the United States Government^[19]. The

[19] As has been indicated earlier in this brief, had the appellant, Marvin Lustiger, testified, he could have shed much light on many issues presented on this appeal. Specifically, he could have testified as to his familiarity and knowledge of the publications of the Bureau of Land Management, including their advertising practices and the prices they charged for land sold by the Bureau.

exhibits referred to consisted of:

Exhibit G: A compendium of the offerings of the Bureau of Land Management, a governmental agency, of small tracts in Arizona, and its publicity attendant thereto - as more fully disclosed by Stip. No. 5, which said tracts were offered at Apache Junction, Liberty, Yucca, and Snowflake (supplemented by Ex. BB-1 - which, by Ex. BB and Stip. No. 9, were established as being authentic pictures of the lands covered by these offerings).

Exhibits AA, AA-1, AA-2, AA-3, AA-4 (covered by Stip. No. 8): A compendium of certain offerings of the aforesaid Bureau of Land Management of small tracts in California, and its publicity attendant thereto, together with concededly authentic pictures of the lands covered by these offerings.

These documents, as to which the government reserved solely an objection as to materiality, were offered:

- (a) to establish the standards of the industry of which LM was a member;
- (b) on the issue of value; and
- (c) to support defendant's position that the government had failed to prove bad faith.

Concededly, unless the materials of Mohave County subdivider competitors (Ex. E) were admissible, the materials of out-of-state competitors were not admissible. Hence, argument here will be confined to what the materials of the Mohave County

subdividers proved. As to the Federal Bureau of Land Management offerings and materials, defendant concedes similarly that if data as to the Arizona small-tract offerings during the period were not admissible, data as to the California small-tract offerings were clearly not admissible. And so, as a predicate for the argument that follows, reference herein is solely to the Federal Bureau of Land Management's small-tract offerings in Arizona and, for brevity, is limited primarily to the Bureau's Apache Junction, Arizona, offering.

Exhibit E demonstrates:

(1) Although every Mohave County subdivision has the same checkerboard pattern as that of LM's subdivision (Ex. 24A), not one of the competing subdividers - any more than LM - disclosed this in their materials (Ex. E: Lake Mohave Ranchos - Sheet 2, 3, 4, 5 (all on last page), Sheets 6, 8, 9, 12; Lake Mohave Estates - Sheet 18 (back page); Lake Mead Ranchos - Sheet 20 (back page), Sheet 21; Meadview - Sheet 24; Golden Valley - Sheet 31, 36; Paradise Acres - Sheets 37, 38, 39).

(2) These competitors used an imagination in the naming of their subdivisions that far outdid LM's naming of its subdivision. Thus, for example:

- (a) Lake Mohave Ranchos, located down the road from LM's subdivision, is a far piece from anywhere near Lake Mohave [20] (although its maps, like those of LM, clearly disclosed the distance)

[20] The standard text of its ads (Ex. E: Sheets 6, 7, 8, 9) lends support to this imaginative naming of a subdivision:

(b) "Meadview" has less than 100
"view" lots (RT 514).

(3) All of the competitors display in their materials a flamboyancy that exceeds that of LM's materials. For example:

"Consider, then, the fact that Lake Mohave Ranchos is virtually surrounded by Lake Mead Recreational Area" (Ex. E: Sheet 1, p. 4; Sheet 2, p. 8)

"If you want to fish . . . it's just minutes away" (Ex. E, Sheet 1, p. 9)

"Here you will find a planned community . . ." (Ex. E, Sheet 21)

"near Las Vegas and Kingman" (Ex. E, Sheet 2, p. 11)

"electric power lines have been constructed to provide power" (Ex. E, Sheet 5, p. 8)

"power lines are being extended" (Ex. E, Sheet 7, 8)

"Lake Mohave Ranchos are a planned development" (Ex. E, Sheet 9)

"nestled in a huge bend of the Colorado River" (Ex. E, Sheet 18)

"Panoramic acre Homesites overlooking fabulous Lake Mead . . . 2 miles from the shore of Lake Mead" (Ex. E, Sheet 23)

[20 cont'd]

"Where Are The Lake Mohave Ranchos Located

"Just a short drive from fabulous Las Vegas, Lake Mead and Boulder Dam. Lake Mohave Ranchos are also in close proximity to bustling and rapidly expanding Kingman, Arizona. Lake Mohave is fed by the Colorado River which offers the Southwest one of the finest resorts in the nation. It is 68 miles long and abounds in trout and bass. Lake Mead, Lake Mohave and Lake Havasu are all part of the Colorado River, and are separated by 3 large dams that supply power for progress in the southwest."

"Hurry only 60 days left to own your 2-1/2 acres in Golden Valley . . . Prices subject to change as land values rise" (Ex. E, Sheet 31)

(4) The price of land in the nearby competing subdivisions greatly increased during the period charged in the indictment and, in every instance, exceeded LM's price for its acreage (\$395 and then \$495 per 1-1/4 acre or \$316 and then \$396 per acre). Thus:

- (a) Lake Mohave Ranchos' price was \$395 per acre and increased to \$895 per acre (Ex. E, Sheets 1-17);
- (b) Lake Mohave Estates' price was \$495 per acre and increased to \$595 per acre (Ex. E, Sheets 18, 19);
- (c) Lake Mead Ranchos' price was \$695 per acre (Ex. E, Sheet 20);
- (d) Meadview's prices started at \$795 per acre (Ex. E, Sheet 23-30);
- (e) Golden Valley's price was \$995 for 2-1/2 acres (or \$398 per acre) and increased to \$1,195 for 2-1/2 acres (or \$478 per acre) (Ex. E, Sheets 31, 35);
- (f) Paradise Acres' price was \$476 per acre (Ex. E, Sheet 38).

Stipulation No. 5, relating to the Federal Bureau of Land Management offerings, establishes that in connection with the U. S. Government Bureau's offering to the public for sale 2-1/2 or 5-acre

tracts it used and distributed the pamphlets that are Sheets

1-4 of Ex. G. These pamphlets represent that:

(1) Under the Small Tract Act citizens obtain lands "for residences, recreation, or business purposes" (Ex. G, Sheet 1, p. 3)

(2) "Under the small tract law, small parcels of vacant public land may be leased or sold if they are chiefly valuable for residential, recreation, business, or community sites. * * * To qualify as a residential site, land must be suitable for seasonal or year-round use as a home for a family." (Ex. G, Sheet 1, p. 5)

(3) "How much will I have to pay for my small tract? At the time the land is classified, it is appraised at its fair market value, consistent with other land values for similar lands in the area. The price varies according to the character, location, and desirability of the land. Land near towns or cities is likely to have a higher value than land in more distant and isolated areas. Also, land fronting on roads, streams, or lakes is more valuable than land not having such frontage." (Ex. G, Sheet 1, p. 22)

(4) "The Small Tract Act of 1938 provides a means whereby a person can obtain land for a homesite, business site, or recreation site, if the land is opened by the Bureau. These tracts may be up to five acres in size." (Ex. G, Sheet 4, p. 9)

The United States Government Agency also secured general publicity for its offerings, such as is shown by Sheet 4A of Ex. G. Note, for example:

"Per-acre appraisals may range from \$100 to more than \$1,000 depending on the location of the land and other factors. Land which appeared practically worthless a few years ago, Helmandollar pointed out, has since become valuable for esthetic or other reasons."

The offering circular by which the Apache Junction lands were offered read in part:

"The center of the Apache Junction Area is at the intersection of the Apache Trail and Highway U.S. 60-70-80-89, and is 32 miles east of Phoenix, Arizona, on the lower southwestern slopes of the Superstition

Mountain Range. The population is approximately 8,500 permanent residents. Three water companies service the area, electricity is available in all but the remote portions, and natural gas is being extended into outlying areas.

"The subject lands are situated on the eastern fringe of the Apache Junction Area and are north of the U. S. Highway 60-70-80-89, and east of the main access road running northerly through the NE 1/4 Sec. 35, and they are considered equally desirable and potentially suitable for desert homesite development. The tracts can be identified by finding the brass cap survey markers for the east quarter corner and the west quarter corner of Sec. 36, and by finding the reference corners for the northwest section corner and the north quarter corner of Sec. 36. Electricity is available to this neighborhood from a power line running along the western boundary of Sec. 25 and the NW 1/4 Sec. 36. Natural gas and water are available at the Palm Springs development 2-1/2 miles to the west, and can be extended into these lands as soon as sufficient demand exists. There are no zoning restrictions. The lands are accessible from U. S. Highway 60-70-80-89 by a graded, gravel road leaving this highway 3.5 miles southeast of Apache Junction, thence northeastward to the point of intersection with the north section line of Sec. 35. A recently cleared and graded road runs eastward along the line for 1/4 mile to the northwest corner of the land, and continues east along the north side of Sec. 36, giving access to the northern portion of the area. The southern portion is accessible from a point on the U. S. Highway 4.25 miles southeast of Apache Junction, then northerly over unimproved roads and trails into the subject land.

"The topography of the NW 1/4, NE 1/4 SW 1/4 and the N 1/2 N 1/2 SE 1/4 Sec. 36, is quite flat, with a very gentle slope. Two main and several very small shallow washes traverse the area.

* * * * *

"The highest and best use for these lands is for desert homesite development.

* * * * *

"Bids sent by mail will be considered only if received at the Arizona Land Office, Bureau of Land Management, 3022 Federal Building, Phoenix 25, Arizona, prior to 3:00 P.M., March 23, 1962." (Ex. G, Sheet 5)

The publicity release of the U. S. Government Agency, relating to the Apache Junction offering, read:

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29." (Ex. G, Sheet 8)

The free newspaper publicity attendant upon said sales said:

"Helmandoller said the tracts are potentially suitable for desert homesites. Electricity is available on the neighborhood from a power line along the Apache Trail.

"Natural gas and water is available at Palm Springs subdivision, 2-1/2 miles to the west. There is no zoning restrictions. All mineral rights are reserved by the government.

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29, the Bureau of Land Management said yesterday." (Ex. G, Sheet 9)

This type of publicity was sought from host of Arizona news media (Stip. No. 5, par. H, BB, CC, DD; Ex. G, Sheets 28-31).

None of the parcels were staked and there was neither water nor any other utility services (electricity, gas or telephone) available at or on the boundaries of said parcels^[21]. There were no roads, bladed or otherwise, leading to said parcels or the boundaries, except for those shown by a map that was available at the Bureau of Land Management office (Stip. 5, Par. L)^[22].

The parcels sold for prices ranging from \$800.00 to \$1,182.00 per acre (Stip. 5, Par. K).

[21] This was true of all of the other Federal Bureau of Land Management offerings in Arizona - at Liberty, Yucca, and Snowflake (Stip. No. 5, Par. Q, V, FF).

[22] As to the Snowflake offering, there were no bladed roads at all leading to the tract or its boundaries (Stip. No. 5, Par. FF).

It was shown that the parcels contained washes 15 to 20 feet wide covering an acre of land; and there were gorges in which could be hidden a car (RT 521) and that all of the parcels on the south were mountainous (RT 522).

Purchasers of parcels received patents (Stip. No. 5, Par. M, Ex. G, Sheet 7A) under which the government reserved a 25' boundary right-of-way for roadway and public utilities purposes. Since this reservation does not run to the benefit of surrounding parcels, it is obvious that the patent, without more, created land-locked parcels without legal right to access.

Exhibit G thus demonstrates that the government, which is and has been the biggest in the field of sales of unimproved lands (truly the leader of the industry), used (and for free) practically every promotional technique that LM and all others in the field used. Note that the gullible would be bound to believe that he was buying a "homesite." Note, too, that by the very text of the government's "brochure," the gullible might naturally be led to believe that by virtue of what was said (" . . . electricity is available . . ."; "natural gas and water are available") and what was not said (note the absence of indication of whether the tracts are staked and the inference from the reserved right-of-way statements that the roads lead to the individual tracts) he was getting a tract ready for immediate city-like occupancy. Truly, the big difference between the U. S. Government's offerings and those of LM is that the government demanded cash whereas LM permitted time payments.

2. Preliminary Case Authority. *United States v. Brandt*, 196 F. 2d 653; *United States v. Sprengel*, 103 F. 2d 876; *Silkworth v. United States*, 10 F. 2d 711.

C. Opinion Evidence

1. Introductory Comment. The court excluded (RT 530) the opinion evidence of the former President of the Arizona League of Land Developers and one of the leading subdividers in Mohave County (RT 447). By stipulation (Stip. No. 3), the authenticity and competency of this opinion was conceded by the government, with the government's sole reservation being as to materiality. This opinion was based upon a review of LM's sales and promotional materials in comparison with those of other land sale companies as used during the period charged in the indictment. The opinion was:

"* * * In my opinion the advertising representations and materials, sales techniques and devices used by Lake Mead Land and Water Company during 1961 and 1962 were well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole. * * *" (Ex. A)

2. Preliminary Case Authority. *United States v. West Coast News Company*, 228 F. Supp. 171; *Senn v. Lackner*, 91 Ohio App. 83, 100 N.E. 2d 419; 100 N.E. 2d 432; 105 N.E. 2d 49; 107 N.E. 2d 588; *Sparkhill Realty Corp. v. State*, 4 N.Y.S. 2d 674, 4 N.Y.S. 2d 1023, affirmed 279 N.Y. 656, 18 N.E. 2d 301, based on 268 N.Y. 192, 197 N.Y. 192; *Sheldon v. Moredal*, 29 F. Supp. 729; *Rolf v. Bird*, 239 F. 2d 257; *United States v. Wood*, 226 F. 2d 924; *Grismore v.*

D. Other Errors and Excluding Evidence

1. The admission of Ex. 42, the deed by which LM conveyed to the customers who paid in full. This could only have been admissible if LM's title difficulties were at bar - yet the government had stipulated they were not (Stip. No. 10, par. 36). In any event, it was inadmissible in view of the judicially noticeable fact that it is the form of deed which every title company uses to convey title.

2. The exclusion of Ex. B and B-1, the Palm Springs exhibits, the materiality of which was to demonstrate that a checkerboard ownership pattern is no real impediment to the development of a thriving city.

3. The exclusion of Ex. D, the Department of Commerce Dale Carnegie bible on tourism in which Uncle Sam encourages, among other things, the use of "imagination" in the naming of attractions and from which any reader would feel perfectly justified in conceiving that it was an appropriate sales technique to call a cattle tank used by kids for summer dunkings as a "favorite swimming hole."

ORIGINAL ARTICLES

THE EFFECT OF VARIOUS FACTORS ON THE RATE OF METABOLISM

BY DR. J. H. HARRIS, JR., AND DR. J. H. HARRIS, JR.

DEPARTMENT OF PHYSIOLOGY, UNIVERSITY OF CHICAGO, CHICAGO, ILL.

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CHICAGO, ILL.

DEFENDANT'S CONVICTION MUST BE REVERSED FOR THE REASON THAT HE WAS DEPRIVED OF EFFECTIVE REPRESENTATION OF COUNSEL, IN VIOLATION OF AMENDMENT VI, UNITED STATES CONSTITUTION.

1. Introductory Comment. By affidavit, defendant has heretofore filed a Motion for Remand for Purpose of Presenting a Motion for New Trial, In the Alternative, a Motion for Reference to Take Additional Evidence. Basically, the contentions stated in defendant's motion, and supported by affidavit, are that the defendant's counsel was mentally incompetent to conduct the trial of the defendant and had a personal conflict of interest adverse to that of the defendant while trying the case on behalf of the defendant. It is defendant's further contention that the mental incompetence of his counsel and the above-referred to conflict of interest resulted in the defendant's counsel advising defendant and his wife not to testify. The affidavits heretofore filed by defendant in support of his motion indicate that defendant and his wife could have supplied valuable evidence which could very well have led to defendant's acquittal.

Necessarily, the record does not disclose the inadequacy of counsel, and all of defendant's contentions in relation to this issue were raised in affidavits in support of the above-referred to motions. It is nevertheless hoped, because of the seriousness of the issue and the charges made by the defendant, that this Court will treat this issue as part of the instant appeal. The fact that this issue may be raised upon a Motion for New Trial, even if this Court affirms the conviction of the defendant, would

seem to constitute a very good reason for this Court entertaining the issue here under discussion, rather than waste the court's time with a new trial.

2. Preliminary Case Authority. *Glasser v. United States*, 315 U.S. 60, ___ Sup. Ct. ___, 86 L. Ed. 688; *Brubaker v. Dixon*, 310 F. 2d 30; *Cord v. Smith*, 338 F. 2d 516; *Tucker v. United States*, 235 F. 2d 238; *Randazzo v. United States*, 339 F. 2d 79; *United States Ex Rel Miller v. Myers*, 253 F. Supp. 55; *People v. Davis*, 48 Cal. 2d 241, 309 P. 2d 1; Rule 33 Federal Rules of Criminal Procedure.

CONCLUSION

The Judgment of Conviction should be reversed with appropriate directions to the trial court in the event the appellant is tried again.

Respectfully submitted,

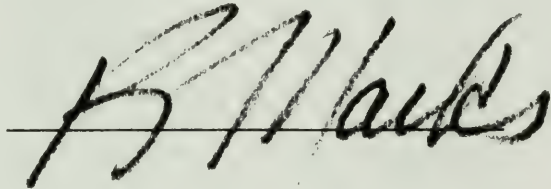
MARKS & SCHNEIDER

BY: BURTON MARKS

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of The United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "B. J. Hanks", is written over a horizontal line. The signature is stylized with a large, sweeping initial "B" and a long, horizontal stroke extending to the right.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

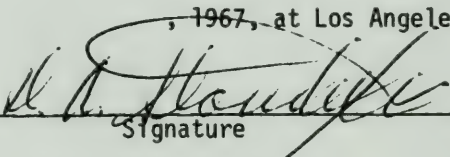
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on _____, 1967, I served the within APPELLANT'S INTERIM OPENING BRIEF (Lustiger vs. United States) on the following named party, by depositing a copy thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

U. S. Attorney's Office
Miss Jo Ann Diamos
Assistant U. S. Attorney
412 Post Office & Federal Bldg.
Tucson, Arizona

I declare under penalty of perjury that the foregoing is true and correct.

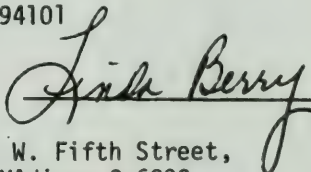
Executed on _____, 1967, at Los Angeles,
California.



Signature

Orig. &
20 copies - United States Court of Appeals
Ninth Circuit
U. S. Post Office and Courthouse Bldg.
7th & Mission Sts.
San Francisco, California 94101

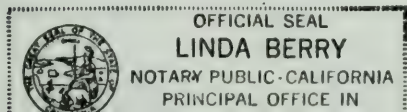
SUBSCRIBED AND SWORN TO BEFORE
ME THIS 29th day of April, 1967



Linda Berry

DEAN-STANDEFER MULTI COPY SERVICE, 215 W. Fifth Street,
Los Angeles, California 90013 - MADison 8-6898

LINDA BERRY
My Commission Expires Nov. 4, 1968



AMERICAN MEDICAL ASSOCIATION

PUBLISHED WEEKLY

Vol. 40, No. 1, January 1, 1923

CONTENTS

Original Articles

Editorial

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Obituary

United States Court of Appeals

NINTH CIRCUIT

No. 20967

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPENDIX "A" THROUGH APPENDIX "G"
TO
APPELLANT'S INTERIM OPENING BRIEF

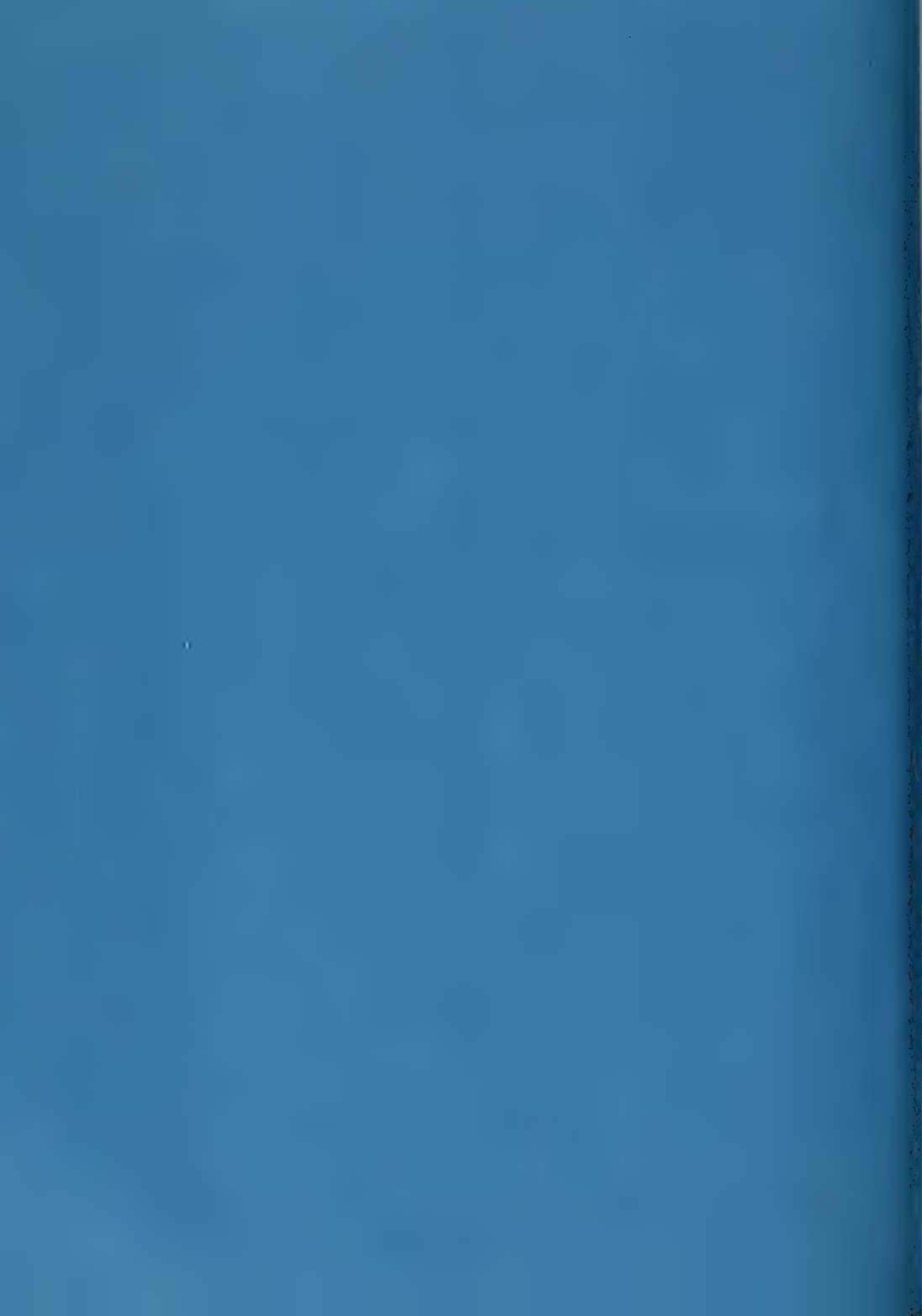
FILED

MAY 1 1967

WM. B. LUCK, CLERK

MARKS & SCHNEIDER
BY: BURTON MARKS
8447 Wilshire Blvd., Suite 217
Beverly Hills, Calif. 90211
Attorneys for Appellant

MAY 1 1967



"IMPORTANT! Plenty Of Water. The photographs on this page show a fine well, a spring-fed pond and a water tank. These water sources, and more, are in the heart of Lake Mead City properties.

"When sufficient demand has arisen, a water distribution company would be formed to take care of individual needs. Such a company has not been formed as yet, but it is a logical development in the future and would conform with the public utility laws of the State of Arizona.

"The official Development Board of the State of Arizona reports that Arizona's vast water storage systems are among the world's largest and most efficient. Even without any additional water awarded by the Supreme Court in the Arizona case, its present water resources will support an industrial and population growth 10 times as big as Arizona's total today!"

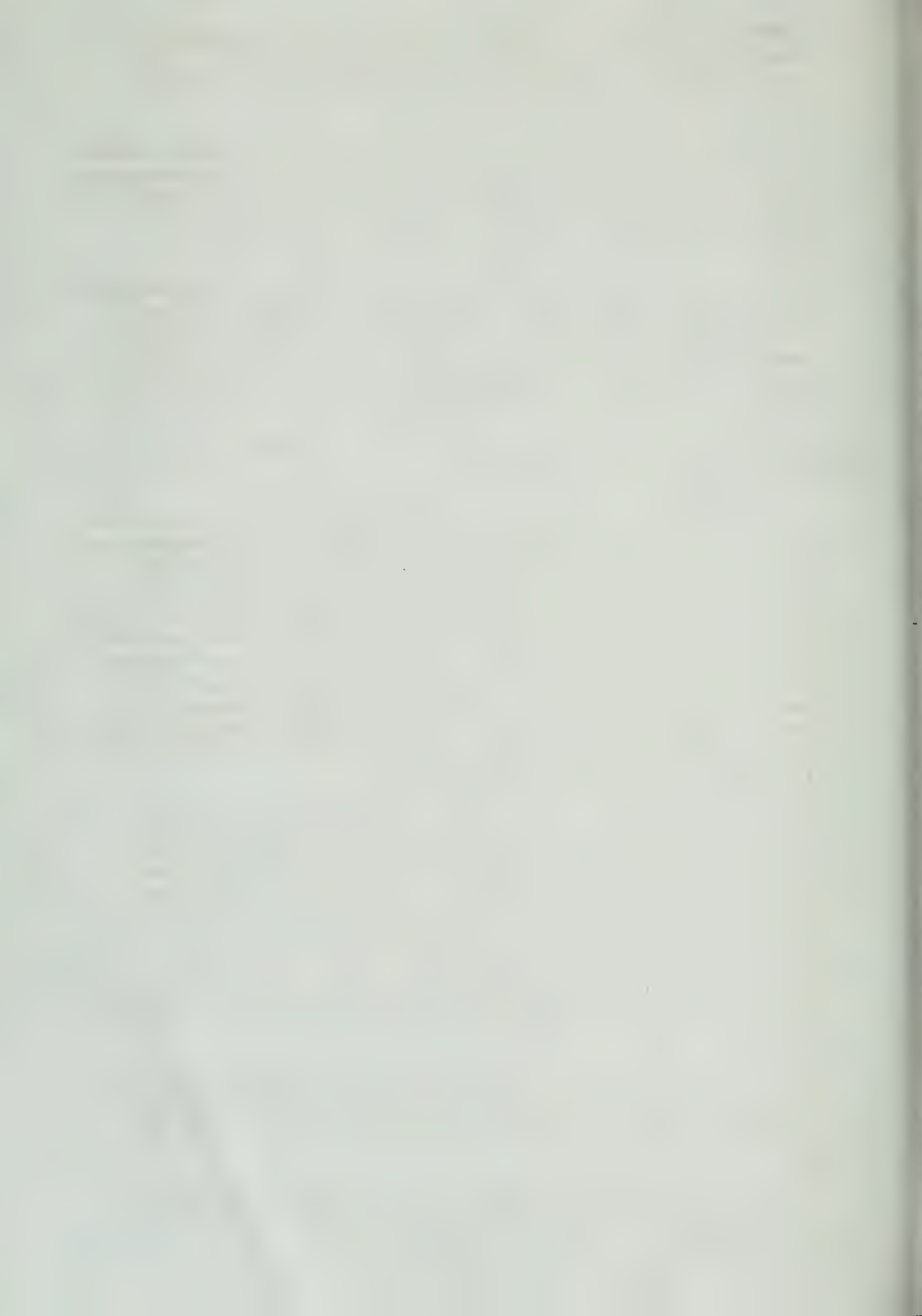
This text appears opposite the opinion of the company's engineer (Ex. 37, p.20):

"* * * Because I have visited and observed the field conditions of the intermittent water producing streams, springs and dug and drilled water wells on your land holdings together with the surrounding area, I know that the underlying area is a water supply of considerable capacity. Water sources have been developed and used in the past for stock-watering. Recent well drilling has brought in wells from a depth of 60 feet to a maximum depth of 660 feet below the surface. Earthen dams have been used to hold surface waters for stock-watering throughout the year. Conservation of surface waters by proper storage should be noted also. Spreader dams could conserve natural rainfall by storage for better vegetation growth.

"The surface of your lands consists generally of good soil covering granites and related formations. These formations have a tendency to absorb and hold water, thus providing a natural water storage. When penetrated by wells these deeper formations provide a good grade of potable water. The wells, springs and water sources included within the boundaries of your lands or adjacent areas provide water of excellent quality for drinking and domestic use, both from a bacteriological and chemical standpoint, according to reports made on samples.

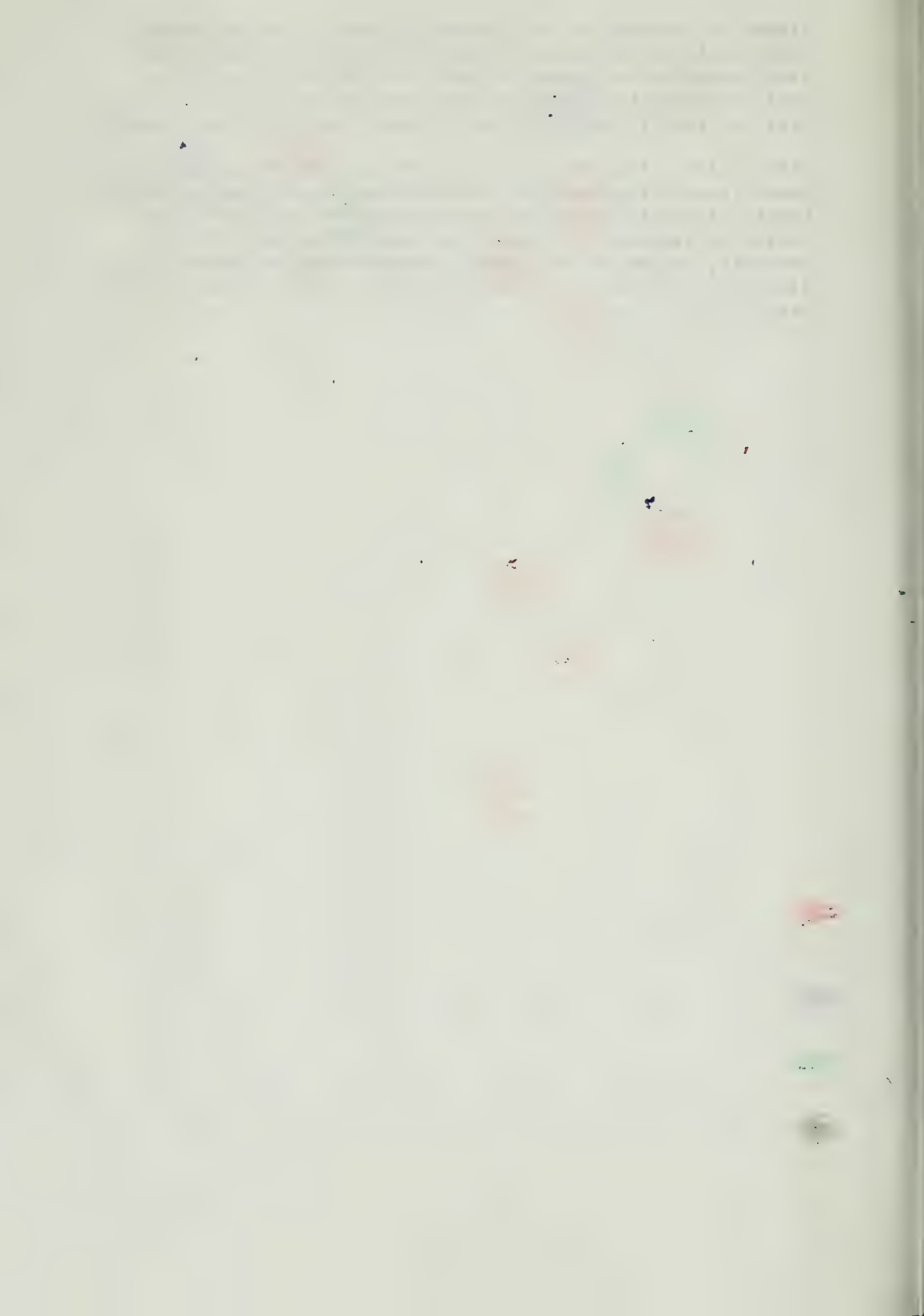
"It is my belief that different portions of your property will produce water from underground sources. The depth to a good supply of water will vary between 60 and 660 feet below the surface.

"There are springs and a shallow well in the eastern part of your estate on New Water Plateau, which indicates good possibilities for developing a domestic supply.

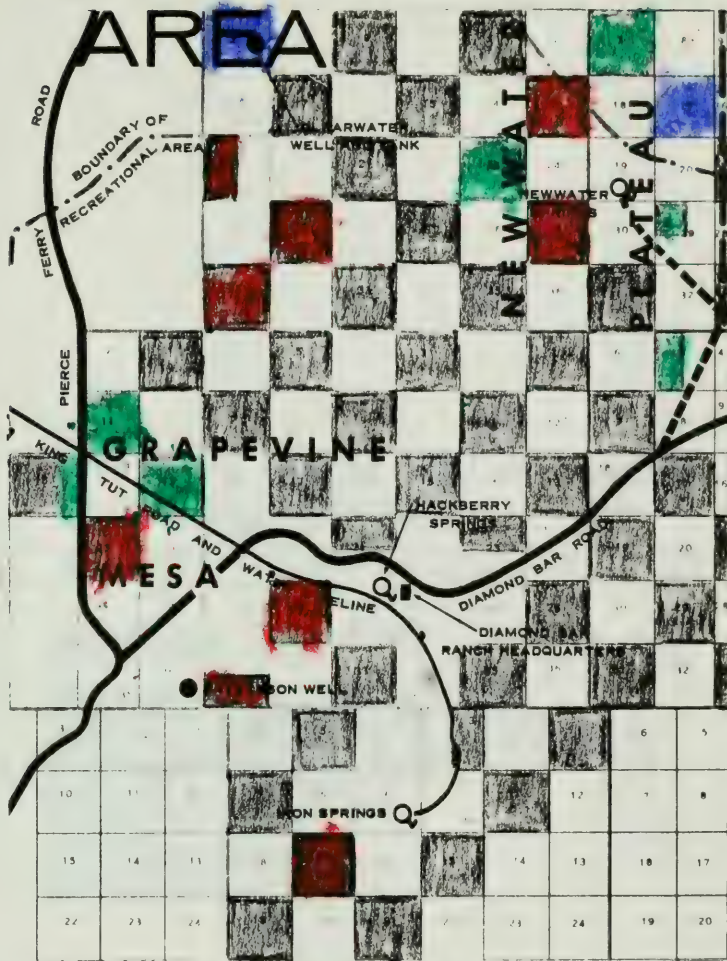


"There is no question in my mind but that a good supply of water could be collected in what is generally known as the Iron Springs area in the NW part of T.28N., R.16W., which could be piped to a great part of your estate, (much by gravity flow) in anticipation of future community development.

"The subject of water on your estate, for the most part, compares favorably with other similar areas in this part of Mohave County, Arizona, and in fact provides water potentialities above the average. Incidentally, Lake Mead, north of your property, is one of the largest storage dams in the world. Its waters are clear and potable, being excellent for domestic use. * * *"



AREA



* Ex. 44 reveals only that of the total parcels available (4,247) in the eleven units from which parcels were sold there were 3,254 parcels "sold or the subject of a company file."



1. The first part of the document is a list of names and addresses, which are arranged in a columnar format. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list is organized into two main sections, with the first section containing names and the second section containing addresses. The names are listed in alphabetical order, and the addresses are listed in a more random order. The list is followed by a section of text that appears to be a letter or a report, written in a cursive script. The text is organized into paragraphs, and the handwriting is very fluid and elegant. The overall appearance of the document is that of a historical record or a personal letter, written in the late 18th or early 19th century.

NOW! INVEST AT LAKE MEAD CITY, ARIZONA

Enjoy fishing, boating, hunting, swimming, horseback riding, in the West's most perfect climate. NO FOG. NO SMOG.

\$395

still buys a choice 1¼ acre parcel. Large enough so that you may divide it into 4 choice lots, *without subdivision expense*, each of which could bring you more than your original cost on the entire parcel.

Arizona is booming with new industries, expanding population, even more recreation. Investors are making huge profits.

\$10

dn.

\$10

PER MONTH



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PLATEAU

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LAKE [redacted]
[redacted]
RECREATION
AREA

Bridge Canyon Dams.
(to stop silting-up of Lake Mead)

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INDIAN
RESERVATION

PEACH
SPRINGS

HUALAPAI INDIAN
RES.
VALENTINE

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HUALAPAI
IND. RES.

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TO LOS ANGELES



"The accused companies have been charged with selling undeveloped land upon fraudulent promises. Allegedly, the accused concerns have represented that all lots, despite their low prices, include paved streets already installed and paid for, piped water already installed and paid for, piped natural gas already installed and paid for, and telephones and electrical services already installed and paid for; represented that the lands offered by these accused companies are different from their true nature; and represented that domestic water and utilities are readily and cheaply available at the site of the land.

"These accused concerns may have made such claims, but you know that this company has not. This company would reiterate what has been made clear to you many times in the past. As you know, this company has never described its property as being other than totally virgin and undeveloped land, not suitable in its present state for home building. Certainly, at these low prices, no reasonable person would expect any paved street or utility improvements. If each parcel had power, water, gas, telephones, useable completed streets, and individual staking, the price would be much greater right now; the company would be selling, for much higher prices, small 25' x 100' city lots as is done in Kingman, Arizona, rather than 1 1/4 acre parcels.

* * * * *

"As all of you are aware, neither domestic water, nor electricity, nor gas, nor telephones are available on the lands which you have purchased. At the moment, domestic power is twenty miles away from the Information Office and even farther away from some of the lands offered by the company. As a practical matter, at the moment domestic water is not available on any of the land you have purchased. However, the company has engineering advice 'that different portions of your property will produce water from underground sources. The depth to a good supply of water will vary between 60 and 660 feet below the surface'. Furthermore, Clear-water Well, to which the company has claim, does exist as shown on your Vicinity Map. At its last testing, the depth to water was 130 feet and the Arizona State Department of Health, after laboratory analysis, has reported the well as a satisfactory source of water for domestic use. Additionally, the company has recently commenced the drilling of a well near its Information Office, close to properties where two purchasers have started construction of homes.

* * * * *

"As a matter of common sense, if the lands you have purchased evidence a need for on-the-site utilities, the value of the land undoubtedly will justify and require that utilities be brought to the lands. You have been able to purchase for your low purchase price, precisely because the land is undeveloped.

"At the time of your purchase, you received a Vicinity Map showing the Lak Mead City area. All land in Arizona is divided into sections, each section being one mile square. Each of the little squares on your map is one section. Less than 14% of the land in Arizona is privately owned. Almost all the remainder is under the ownership or control of the federal government and the state government. This relative scarcity of private land has in the past helped boost its price. All of the even numbered sections on your Vicinity Map are government owned or controlled. The government also owns or controls many of the odd numbered sections on your map. In short, as indicated by the company's previous mailings, only some of the odd numbered sections are owned by the company.

* * * * *

"The Vicinity Map shows, as you were previously told, that the company's lands start less than five miles from Lake Mead as the crow flies. It would be difficult to find private lands much closer than this, because the federal government years ago established control over virtually all lands within five miles of Lake Mead. Such federal lands are known as the Lake Mead National Recreation Area, which is administered by the National Park Service. Some of the company's land is actually inside the Lake Mead National Recreation Area. This is highly unusual, but it is perfectly legal to own private land within this Recreation Area. The government has no claim or rights on such private lands. Most of the company's land is to the south of the Lake Mead National Recreation Area, as is clearly shown on your Vicinity Map. As the crow flies, distances from various parts of the company's land to Lake Mead may vary from five miles to sixteen miles. As a geographic fact, there is very little subdivided land located closer to Lake Mead.

"Lake Mead City is split longitudinally by the magnificent Grand Wash Cliffs. The bulk of the land the company has sold is located in the valley to the west of these Cliffs. The remainder of the land sold is in the mile-high plateau above and to the east of the Cliffs. The company has engineering advice that each and every parcel sold has a useable building site without any guarantee of the economic feasibility of access roads now shown as easements, but not yet installed to each parcel. The lower valley and the upper plateau are now connected by the unpaved Diamond Bar road which is mostly maintained by the County.

* * * * *

"The company is confident that all of you purchased on the basis of the facts the company presented you. The replies to the questionnaire confirm that, except for a negligible minority, every purchaser who has seen Lake Mead City either before or after purchase is more than satisfied. Therefore, if the confusion sown by the recent nationwide publicity concerning the alleged

fraudulent practices of other companies has disturbed you, please go and personally inspect Lake Mead City. The Information Office, on the property, is open seven days a week and is open on holidays, too. This Information Office is 60 miles from Kingman, Arizona; 70 miles from Hoover Dam; and 100 miles from Las Vegas, Nevada. Most of this distance is via excellent paved United States highways and a paved portion of the Pierce Ferry Road. The remainder of the Pierce Ferry Road is not yet paved but is continuously maintained by the county and is quite suitable for passenger cars, house trailers and boat trailers. A camping area is available adjoining the Information Office.

* * * * *

"As concrete indication that the company is certain you will be satisfied with your purchase, and in line with the company's continuing policy of bending over backwards to assure the satisfaction of each and every customer, please be advised that any customer who inspects Lake Mead City prior to September 1, 1963, and is then dissatisfied with his purchase for any reason whatsoever, will be given the right at that time to sign a request for a full refund at the Information Office on the property, and that all such requests so signed at that time will be honored. If for any reason you may be unable to visit Lake Mead City this summer, please notify the company within the next fifteen days and a reasonable extension to this offer will be granted. The company very much would like to keep every one of its valued customers, but most of all, the company wants them all happy."

THE LOCATION OF PARCELS PURCHASED
BY CUSTOMER WITNESSES

[G - Government Witnesses;
D - Defendant Witnesses.]

Section 13-30-16

(G) Reed (Parcel 246) a
(G) Corley (Parcels 273, 274) a

Section 25-30-16

(G) Bean (Parcel 378) b
(G) Oldfield (Parcel 175) a

Section 19-30-16

(G) Binkley (Parcels 1, 2) c

Section 29-30-16

(G) Leonard (Parcel 221) d

Section 31-30-16

(G) Bender (Parcel 34) c
(D) Lincoln (2 Parcels) e
(D) McDonald e

Section 23-29-17 (The Building Area)

(D) Hummel e, f
(D) Sweeney e, g
(D) Russell e, g
(D) Mitchell e, g
(D) Meyer e, f

Section 29-29-16

(G) D'Amico (Parcel 41) h
(G) Rodler (Parcel 125) b
(D) Davison (Parcel 377) e

Section 31-29-16

(G) Mecchi (Parcel 58) i

Section 17-28-16

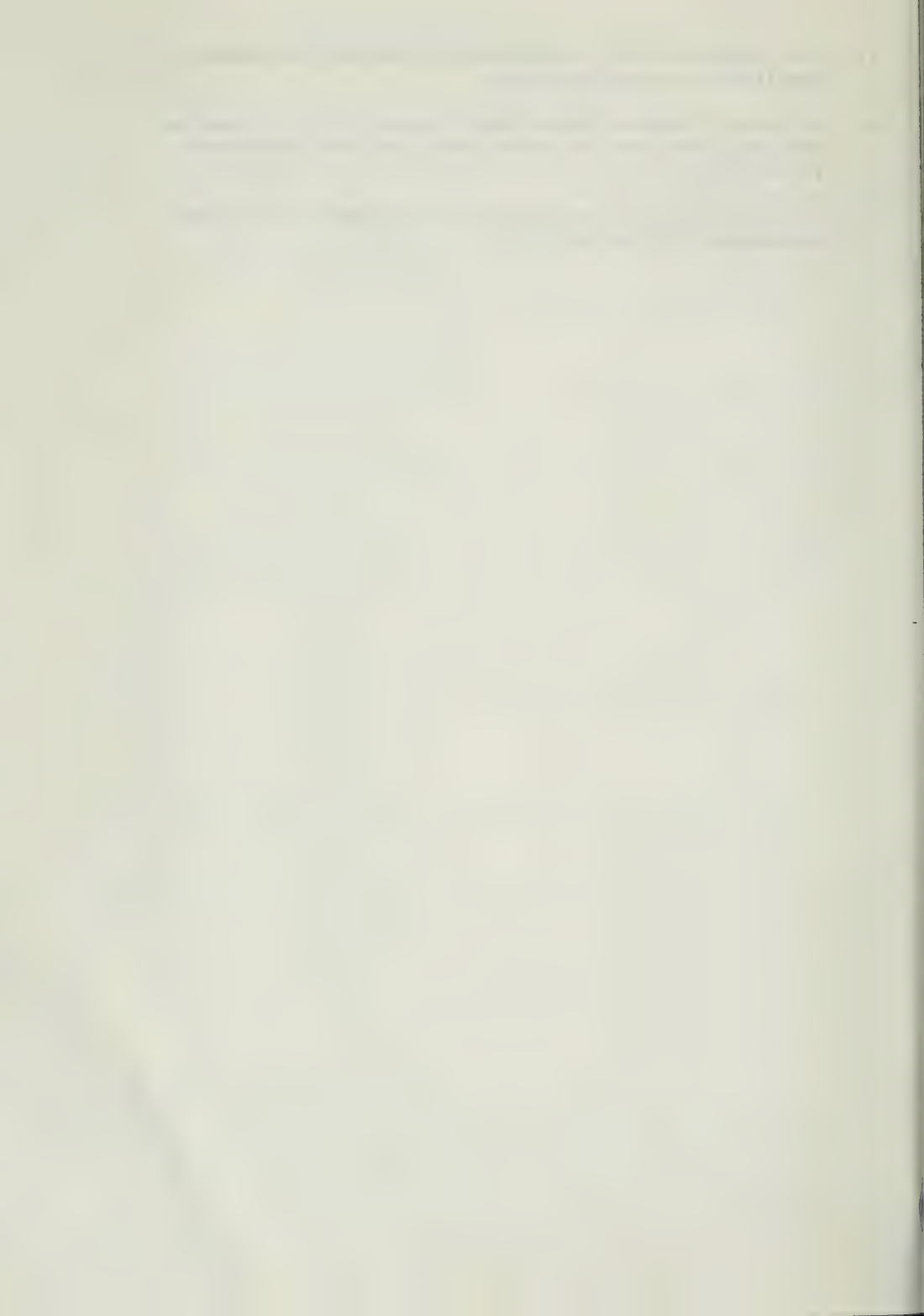
(G) Bland (Parcel 67) j
(G) Feldman (Parcel 143) k
(G) Ball (Parcels 37, 53) l

-
- a. Quit paying for reasons not connected with property; no request for refund or compliance with refund offer.
- b. Refunded in full on complaint prior to refund offer.
- c. Paid through mid-1963; no request for refund after earlier visit; upset by post office investigation; no compliance with refund offer despite being in Phoenix in mid-1963.
- d. Paid to maturity; upset by post office investigation; no compliance with refund offer despite being in Phoenix in mid-1963.
- e. Obviously satisfied customer.
- f. Bought after visiting property.
- g. Traded from other unit.
- h. Paid in full; no request for refund after earlier visit; no compliance with refund offer despite being in Phoenix in mid-1963.
- i. Paid in full; no compliance with refund offer despite being in Phoenix in mid-1963.

(continued)



- j. Quit paying without complaining; no request for refund or compliance with refund offer.
- k. No specific request for refund; ignored offer to trade to Building Area prior to refund offer; no compliance with refund offer.
- l. No complaint after earlier visit; refunded in full after compliance with refund offer.



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20967

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

MAY 31 1967

WM. B. LUCK, CLERK



JUN 2 1967

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARVIN LUSTIGER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20967

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On October 25, 1963 an Indictment was returned by the Federal Grand Jury sitting in Phoenix, Arizona, charging the appellant with nineteen (19) counts in violation of 18 U.S.C. §1341 (mail fraud). Each count charged the defendant with mailing a different individual material in furtherance of the

scheme to defraud. Transcript of the Record Vol. I, page 2. (Hereinafter Vol. I of the Transcript of Record will be referred to as "RC," the number following will refer to the page. Vol. II through V of the Transcript of Record i.e. the Reporter's transcript, will be referred to as "RT," the number following will refer to the page, and the number following letter "L" will refer to the line. The appellant will be referred to as Marvin Lustiger).

The Indictment was filed in the Phoenix Division of the United States District Court for the District of Arizona on October 25, 1963 (RC 325). The Court issued a Summons to the appellant, returnable on November 18, 1963, and set the appellant's bail in the sum of \$3,000; on October 28, 1963 Mr. Jack Madden, Phoenix, Arizona, filed an appearance for the appellant, and at that time the Court ordered that all records, papers, documents and exhibits produced by the appellant at the Grand Jury proceedings released to counsel for the defendant and made available to the Government (RC 325).

After two requests for delay the appellant was arraigned on February 4, 1964 and the appellant pleaded not guilty to all counts of the Indictment, and a Motion for change of venue was made by the appellant (RC 326).

On May 8, 1964, the case was set for trial on November 18, 1964, but on August 24, 1964 by stipulation, the trial date was vacated (RC 326).

On September 15, 1964, the appellant filed a Motion to transfer the case to Tucson Division for hearing (RC 326). On January 29, 1965 the Court, after hearing arguments on both sides, ordered the transfer of the case to the Tucson Division (RC 326).

On March 1, 1965 the appellant filed (1) a Motion to Dismiss the Indictment, or, alternatively, a Motion for Disclosure of Minutes of the Grand Jury and Motion to Dismiss the Indictment on the Basis of Disclosure and a Memorandum of Law and Notice; (2) a Motion to Dismiss for Lack of Jurisdiction, For Inadequacy of Evidence Before the Grand Jury to Sustain the Indictment, and in the Alternative, on the Grounds that 18 U.S.C.A. §1341 and the Indictment are Unconstitutional if the Indictment States an Offense Against the United States under 18 U.S.C.A. §1341, and a Memorandum of Authorities; (3) a Motion to Dismiss on the Grounds Each Count Fails to State an Offense Against the United States and Each Count is Duplicitous and a Memorandum of Authorities; (4) a Motion for Discovery and Inspection of Documents and To Take the Deposition of Doyle C. Marshall in Order to Afford Defendant with Due Process Under the United States Constitution, and Memorandum of Authorities and Notice; (5) Motion for Discovery and Inspection Under Rule 16, F.R.Cr. P. and Memorandum and Notice; (6) a Motion for Suppression of Evidence and Memorandum and Notice; (7) a Motion for a Bill of Particulars and Memorandum of Authorities and Notice, and (8) Affidavit Supporting Defendant's Motions (RC 326-327 see also RC 30 thru 95 and exhibits at 96-193).

On March 1, 1965, the Court set March 20, 1965 as the date of hearing for the Motions of Marvin Lustiger and set the date for trial as June 8, 1965 (RC 327).

On March 17, 1965 the Government filed one Memorandum in Opposition to the Motions (RC 327).

On March 20, 1965 after hearing argument by both sides, the Court *denied* the first three Motions and the sixth Motion,

(RC 327). The fourth, fifth and seventh Motions were taken under advisement (RC 327).

On March 20, 1965 Marvin Lustiger filed a Waiver of Trial by Jury (RC 327).

On April 3, 1965 the first pre-trial was held (RC 327). The first twenty exhibits of the Government were marked, but no reporter or clerk was present. (Lustiger filed a written waiver of his presence at all pre-trial conferences RC 197.)

On April 15, 1965 the Court denied the three remaining Motions which had been taken under advisement; "Provided, however, that to the extent that the Motions are based on *Brady v. Marpland*, insofar as they concern matters relating to punishment are postponed for a decision until after the ruling on guilt or innocence in the case; and insofar as the motions relate to matters concerning the defendant's guilt or innocence, the same may be renewed by defendant at the close of the government's case. If the motions are renewed at the close of the government's case, the Court will make an in camera inspection of the United States Attorney's file and all statements of witnesses. The Court will return to the United States Attorney all work product material, exhibit to defendant and his attorney all matters, which in the Court's opinion, would bear on the question of defendants' guilt or innocence, and will order the balance of the file sealed and delivered to the Clerk so that it may accompany the record on appeal, if any. The United States Attorney is granted permission to substitute photostatic copies for material examined in camera and have returned to him the original material" (RC 327-328).

On April 29, 1965 the second pre-trial hearing was held and Stipulations 1 and 2 were filed at that time; certain num-

bered exhibits were marked in evidence, pursuant to the Stipulations (RC 328).

The third pre-trial conference was held on May 14, 1965 and Stipulations 3 and 4 were filed, and on June 2, 1965 were approved by Marvin Lustiger (RC 328). Stipulations 5, 6, 7 and 8 were filed on June 4, 1965 and approved by appellant on June 7, 1965 (RC 328). On June 7, 1965 Stipulations 9 and 10 were filed by the United States and approved by appellant on the same date (RC 328).

The trial was held at Tucson, Arizona on June 8, 9 and 10, 1965 (RC 328-329).

On June 10, 1965 Counts IX and X of the Indictment were dismissed on motion of the Assistant U. S. Attorney and the Motion of the appellant for judgment of acquittal was denied by the Court (RC 329).

On June 11 and 15, 1965, Marvin Lustiger offered evidence and on June 15, 1965 a Waiver of special findings of fact was filed (RC 329).

On June 16, 1965 the case was argued before the Court. The Court found the appellant guilty as charged in Counts I through VIII, and XI through XIX, and fixed the time for passing judgment on August 2, 1965, and, the Court granted Lustiger to and until July 16, 1965 to file motion for new trial, motion in arrest of judgment or such other post-verdict motion he desired (RC 329).

On June 28, 1965 the Court entered judgment and fined the appellant \$1,000 on each count of I through VIII and XI through XVIII; imposition of sentence suspended on Count XIX for six months on condition that fines imposed on Counts I through VIII, and XI through XVIII are paid within 90 days from June 28, 1965 (RC 329).

On June 28, 1965 a \$14,000 check was added to appellant's \$3,000 bail check to serve as bond pending appeal and it was stipulated that should the judgment be formally approved on appeal, the total sum of \$17,000 would be applied by the Clerk to the payment of the fines imposed, and if reversed the sum of \$17,000 would be returned to Marvin Lustiger (RC 329).

On July 7, 1965 Marvin Lustiger filed Motion for Judgment of Acquittal; Motion for New Trial, and Motion for Arrest of Judgment (RC 329). On July 9, 1965 the Court entered an Order giving Marvin Lustiger 40 days after receipt of the reporter's transcript to file memoranda, the Government to have up to 40 days following receipt of Lustiger's memoranda and Lustiger to have 20 days to file a reply (RC 329). On October 1, 1965 Lustiger filed a Memorandum in Support of Motion for Judgment of Acquittal and Motion for New Trial (RC 329). After being granted an extension of time, the Government filed its Memorandum on October 25, 1965 (RC 330). On November 15, 1965 Lustiger filed his Reply Memorandum (RC 330). On January 4, 1966 the Court set the Motions of Lustiger for hearing on January 17, 1966 (RC 330). On January 17, 1966, the Motions were heard by the Court with Lustiger present in person and by counsel, and the Motions were denied (RT V 4, 18, L 10-12 and RC 330).

On January 24, 1966 the appellant filed a Notice of Appeal (RC 330).

Lustiger's counsel was granted an extension of time to file record on appeal to April 24, 1966, and on April 21, 1966 the record was transmitted to this Court (RC 330).

On September 9, 1966 substitution of attorney Burton Marks for Jack Madden was made by Marvin Lustiger.

On September 27, 1966 Lustiger filed a Motion to Remand and on October 24, 1966 this Court entered an order denying the Motion without prejudice and further that if after filing a Motion for New Trial in the District Court and that Court files a statement it wishes to hear it, appellant may renew the motion there. On January 6, 1967 Lustiger filed in the U. S. District Court for the District of Arizona his Motion for New Trial based on Newly Discovered Evidence that his trial counsel was incompetent. On January 9, 1967 Judge James A. Walsh filed a statement "the Court now states it does not wish to hear the Motion".

On January 31, 1967 the appellant filed a Motion for Remand in the District Court for purpose of presenting a Motion for a new trial or in the alternative a Motion for reference to take additional evidence. At the same time the appellant requested an extension of time to file the opening brief within 60 days after a ruling by the 9th Circuit Court of Appeals on the Motion to Remand. On February 23, 1967 the 9th Circuit Court of Appeals denied the Motion and allowed the appellant 30 days time to file the opening brief on appeal.

On March 20, 1967, the appellant requested time until May 1, 1967 to file the opening brief. This request was approved on March 24, 1967 by the Court.

On March 21, 1967 the appellant filed a Motion with the Supreme Court of the United States for an order directing the Court of Appeals for the 9th Circuit to abate the appeal and remand the matter to the trial court for the purpose of hearing a motion for a new trial on the grounds of newly discovered evidence. The Court through Justice Douglas denied the Motion on April 13, 1967.

This appeal is under the provisions of 28 U.S.C.A. §1291.

II.

STATEMENT OF FACTS

Marvin Lustiger caused the formation of The Lake Mead Land and Water Company (hereinafter LMLWC) on September 7, 1960 (Stipulation I, para 1-6). He and his family owned all of its stock, and Lustiger alone was responsible for the policy making and management of the company (RT 359, RT 370).

LMLWC controlled (either owned or had options to purchase) approximately 64 sections of land in Mohave County, Arizona, (Govt. Ex. 23, 24), for which it paid an average of \$40 an acre (RT 368). It subdivided 20 of these sections, consisting of 9844 acres and 6548 parcels, and offered all or part of 11 of these sections, consisting of 6400 acres subdivided into 4247 parcels, to the public for sale (Ex. 27). (Only 20 had been subdivided as shown on Ex. 27). By March 10, 1962, approximately 3,000 lots had been sold with 200 having been paid for in full (RT 361).

The entire sales operation of Lake Mead was conducted by the use of the United States mail (Exhibit 58, Stipulated Fact No. 10). Lustiger organized Arizona Associated Advertising Agency, a "house agency," to handle the advertising for said corporation (Exhibit 58, Stipulated Fact No. 13). The Lake Mead Company, through the Appellant, informed all mail customers that mail should be sent to the Company at P.O. Box 13349, Phoenix, Arizona. The appellant used this Post Office box as a point from which the mail was forwarded to him at Azusa, California by a part-time employee (RT 79-80—362, Ex. 61-62). After receipt, the appellant processed the mail through the National Land Company (owned by the appellant) and returned it to Phoenix by bus where the part-time employee placed the correspondence in the mail

so that the return post mark was consistent with the mailing address previously given to the customers (RT 81-82, 363). At no time did LMLWC, or appellant, notify customers that LMLWC did not, in fact, have a working office in Phoenix. All checks were cashed in a Phoenix bank so that they would show an Arizona cancellation (RT 82).

To induce sales, Lustiger caused the LMLWC to advertise its property in newspapers and other publications throughout the country, asking that replies be sent to the post office box in Phoenix (RT 362 L 15-18 and Exh. 29 thru 36a). Those who answered were sent an extensive brochure (Exh. 37 series) and vicinity map (Exh. 38 series) and letter (Exh. 40 thru 40i) (RT 362 L 19). If a reservation form was then returned to P.O. Box 13349 with a \$10 deposit, the appellant caused the LMLWC to send the customer a plat map on which the lot being purchased was marked, together with a contract for execution (RT 362 L 23-25 to 363).

The advertising brochure which Lustiger had LMLWC distribute, entitled "Join Us for Pleasure and Profit at Lake Mead City," (Govt. Ex. 37a thru 37f) made numerous representations about the virtues of "Lake Mead City." Thus, the city was described as "Arizona's best located planned community," (Govt. Ex. 37a-37f p. 4), situated "less than 5 miles from the Lake," (Govt. Ex. 37a-37f, p. 17), "within a beautiful Joshua Tree Forest, and, in the heart of the Lake Mead National Recreational Area." (Govt. Ex. 37a-37f, p. 9). It was said to be "one of the best planned and fastest selling resort areas in Arizona" (Govt. Ex. 37a-37f, p. 3). The brochure stated, furthermore, that "county roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times." (Govt. Ex. 37 a,b,c, p. 8), and that "all road easements are provided to assure [the buyer] of access" (Govt. Ex. 37a-37f, p. 30). Lake Mead City was

described as being "easily reached, with access via U.S. Highways and County Roads," (Govt. Ex. 37a-37f, p. 16), and modern schools, churches, and shopping facilities were located in "nearby Kingman, the county seat, and the largest city in northwest Arizona" (Govt. Ex. 37a-37b, p. 5).

In addition to such verbal descriptions, the brochure relied on photographs. Thus the statement "Important! Plenty of Water" (Govt. Ex. 37a-37f, p. 21) was juxtaposed with photos showing substantial bodies of water. Other photos showed a "Favorite swimming hole" and a "comfortable ranch house," (Govt. Ex. 37a-37f, p. 25) "within the boundaries of Lake Mead City" (Govt. Ex. 37 d, e, f, p. 25). In short, the brochure did indeed convey the impression that the land was among "the finest ever offered for sale in the State of Arizona" (Govt. Ex. 37a-37b, p. 5).

The facts, however, were very different. LMLWC subsequently admitted that its land was totally undeveloped and "was not suitable in its present state for homebuilding" (Govt. Ex. 50, p. 1). Only four houses had been built in Lake Mead City (RT 404), and much of the land was rocky, hilly, and cut by very deep washes (RT 379-80). Lake Mead City land was available, moreover, only in a checkerboard pattern because the Federal government owned the even numbered sections (Govt. Ex. 50, p. 3; Govt. Ex. 58, Stipulated Fact 17). A cliff approximately 1,000 feet high traversed the land (RT 388). Several of the parcels which had sold could not be reached by use of ordinary motor vehicles, and others could not be reached even with a Scout 4-wheel drive vehicle (RT 375-38).

The "planning" of Lake Mead City consisted of little other than designation of contiguous rectangular residential parcels and adjoining rectangular "commercial areas" (Govt.

Ex. 28). Only one of the 20 subdivided units had graded streets (RT 378), and LMLWC ultimately admitted that it could not guarantee the economic feasibility of construction of access roads to the parcels (Govt. Ex. 50 p. 4).

Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage (Govt. Ex. 50 p. 2-3). The Clearwater well was the only source of water controlled (i.e. under option) by the Lake Mead Company (RT 298, 361). Moreover, the photos of bodies of water included on page 21 of the brochure (Govt. Ex. 37) were taken not of Lake Mead City property, but rather at the Diamond Bar Ranch (RT, 255-56). The "Favorite Swimming Hole" photo at p. 25 of the brochure similarly was taken at Diamond Bar Ranch (RT 258), and its foreman testified that it was not a swimming hole but rather was a dirt stock tank for stock water with perhaps 2 feet of mud on its bottom (RT 270-71).

In regard to the location the project, although the nearest section of Lake Mead City was approximately 5 miles from the Lake as the crow flies, (Govt. Ex. 50, p. 4), it was 15 to 40 miles from the Lake by road (RT 393). The nearest electrical power line, furthermore, was approximately 23 miles from Lake Mead City (RT 393), and Kingman, population approximately 6,000, (Govt. Ex. 50, p. 2), was about 60 miles away (RT 393).

Despite these facts, sales through the extensive advertising program continued until May of 1962 at which time the advertising program was discontinued when litigation over use of range rights was unfavorable (RT 366-67. By March 10, 1962, 3000 lots had been sold (RT 361). The Govern-

ment offered the testimony of the following witnesses who relied on the brochure, Exhibit 37 Series: Mr. Reed (RT 87); Mr. D'Amico (RT 96-97); Mr. Corley (RT 101); Mr. Bland (RT 107); Mr. Feldman (RT 113 and 115); Mr. Rodler (RT 137-138); Mrs. Bender (RT 150); Mr. Ball (RT 165); Mr. Bean (RT 178); Mr. Binkley (RT 184); Mr. Leonard (RT 208); Mr. Oldfield (RT 227-228; 232-233); Mrs. Johnston (RT 238). (Mr. and Mrs. Johnston never purchased land, but received the brochures, etc., tried to get to the land and wouldn't buy after that); Mr. Mecchi (RT 245). Some of the customer witnesses for the defense had not even seen their lots, only the area, Col. Davidson (RT 436, L 22-23); the next one, Mrs. Hummel, bought a house from Mrs. Garret Haynes, not a lot through the mail (RT 498, L 21, thru 449, L 7); the next one, Howard F. Sweeney, saw the area (RT 549, L 4-8); the next one, in 1964, Betty Russell, went to the Information office, never looked at the land she purchased, and traded lots (RT 557, L 17, thru RT 559, L 2); nor did Thomas Lincoln look at the lot, only the area (RT 577, L 23-25, RT 578, L 15-16, and RT 579, L 25, to 580, L 3); Etta Mitchel lived at the Information office and who had originally purchased a lot, never went to see the lot (RT 584, L 19-24), until a year after she moved to the Information office; Otis McDonald did not get close to his land (RT 610, L 8-10); the last one, Delmar J. Meyers, purchased in the building area, Section 23, and saw his lot before he purchased it (RT 616, L 18-20).

III.

OPPOSITION TO SPECIFICATION OF ERRORS RELIED ON

1. The evidence introduced into evidence was legally obtained, and the Mail Cover was not illegal and was not in violation of Appellant's rights as guaranteed by the Constitution.

2. The Motion to Dismiss Indictment, Or Alternatively for Disclosure of the Minutes of the Grand Jury, and Motion to Dismiss Indictment on the Basis of the Disclosure, were properly denied.

3. The Motion to Dismiss the Indictment was properly denied since the Indictment did state an offense and 18 U.S.C., §1341 is not unconstitutional.

4. The Motion to Dismiss the Indictment was properly denied since each count stated an offense and each count was not duplicitous.

5. The Court did not commit prejudicial error in its denial of a Motion for a Bill of Particulars and in the Order permitting Appellant to raise the Motion for Discovery at the close of the Government's case and in any pre-sentence investigation to be had should there be a conviction.

6. The Indictment was valid and did not violate the First Amendment rights of the Appellant.

7. The Court did not commit prejudicial error in finding from the entire evidence sufficient evidence to convict, and, further, there is an ascertainable standard of guilt, and, further, proof of someone being defrauded is not an element of the offense.

8. There was no prejudicial error by the Court in sustaining the Government's objection to James M. Smith's opinion as to the value of the land, and the Government's objection to the advertising of adjacent land promotions and land promotions in other states, and the Government's objection to the former President of the Arizona League of Land Developer's opinion of Lustiger's advertising, and, further, there was no error in the admission of Exhibit 42 offered by the Government.

9. Lustiger was not denied effective representation of counsel at trial.

IV. SUMMARY OF ARGUMENT

1. Evidence procured as a result of a Mail Cover where there has been no delay of the mails is not illegally obtained evidence.

2. There were not sufficient grounds shown by Appellant for the disclosure of the Grand Jury Minutes and therefore the Motion to Dismiss and the Motion for Disclosure were properly denied.

3. The Indictment does state an offense for violations of 18 U.S.C., §1341, and 18 U.S.C., §1341 is constitutional.

4. The Indictment did not contain duplicitous Counts.

5. The *Brady v. Maryland* Motion was not denied and the Trial Court did not abuse its discretion in denying the Motion for a Bill of Particulars.

6. The charges in the Indictment do not violate Appellant's First Amendment right to free speech.

7. There was sufficient evidence to find Appellant guilty beyond a reasonable doubt, there being an ascertainable standard of guilt under the offense charged, and proof of someone being defrauded is not an element of the offense.

8. The testimony of rancher James M. Smith's opinion as to the value of the land was not material, nor was the evidence of the advertising of adjacent land developments material, much less the advertising of land developments in other states, nor was the opinion of the former President of the Arizona League of Land Developers of the advertising of the Appellant admissible, nor was there error in admitting Government's Exhibit 42.

9. Appellant was afforded effective assistance of counsel at trial.

V. ARGUMENT

1. Evidence procured as a result of a Mail Cover where there has been no delay of the mails is not illegally obtained evidence.

Lustiger, in a pre-trial motion (RC 72 et seq) and supported by paragraph 7 of the Affidavit of his trial counsel (RC 85 at 88-89), moved to suppress all the evidence of the Government on the grounds the evidence was the result of an illegal "mail watch" which violated Lustiger's rights under the Fourth Amendment. Paragraph 7 of the Affidavit of Lustiger's trial counsel was:

"7. Upon information and belief (based upon the belief that a 'mail watch' was the only source from which said Marshall, on and prior to January 22, 1963, could

secure such information), said Marshall procured the addresses of the customers to whom he sent Exhibit J by means of a 'mail watch' whereby and whereunder by physically taking possession of the mail being sent by customers to Lake Mead at its Phoenix, Arizona, post office box, he copied or caused to be copied the names and addresses of Lake Mead's customers. Upon information and belief, all evidence which said Marshall procured from said customers was therefore derived and springs from said 'mail watch'."

The Government in its Memorandum in Opposition alleged that Lustiger assumed there was a delay. At the hearing of the Motion on March 20, 1965, a reporter was present; however, the transcript is not a part of the record. The Postal Inspector Doyle Marshal was present as well as Lustiger at the hearing. The Government's attorney asserted there was no delay of the mail, and that the instructions to the postal employees were to record as many of the addressees' return addresses as would not delay the mail. This was conceded by Lustiger's counsel that there was no delay. The thrust of his argument was that the mere recording of the addressee's name and address was an illegal search and seizure.

Appellant in his brief at page 49 cites some of the cases cited by trial counsel, and cites in addition *Griswold v. Connecticut*, (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, which was not cited by trial counsel. This case deals with the reversal of a conviction under a Connecticut statute prescribing the *use* of contraceptives. The reversal was based on the violation by the Connecticut statute of the right of privacy of married people. It is respectfully submitted that the *Griswold* ruling has no application.

In the brief are cited the following cases, which hold:

Weeks v. United States, (1914) 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, which held the Government cannot retain for evidence, letters and correspondence of the accused seized in the house of the accused, in the absence of the accused and without the authority of the accused by a United States Marshal who did not have a warrant for arrest or for search.

Boyd v. United States, (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, which held unconstitutional the fifth section of the Act of June 22, 1874, the Customs Revenue Law, which section authorized the United States Attorney to get a Court Order directing a respondent in a forfeiture proceeding to produce invoices and if the respondent does not, the allegations of the United States Attorney as to what they will prove will be taken as confessed. The Supreme Court held the section to be in violation of the Fifth Amendment (compelling a person to testify against himself), and of the Fourth Amendment (unreasonable search and seizure). (The trial memorandum (RC 72) cited *Weeks* and *Boyd* for the proposition that the Fourth Amendment prevents unlawful searches and seizures.)

In the Matter of Jackson, (1877) 96 U.S. 727, 24 L.Ed. 877, 23 Wall. 877, which denied petitioner's application for reversal of his conviction for sending lottery matter through the mail on the grounds that the record did not show the pamphlets were sealed or unsealed. The Supreme Court recognized First Class Mail Matter was protected by the Fourth Amendment, which is the proposition for which it was cited by Lustiger's trial counsel (RC 73-74).

Oliver v. United States, (8th Cir., 1957), 239 F.2d 818, which held that First Class Mail cannot be opened and searched. The Court held the opening of Air Mail which had been sent from Kansas City, Missouri, to Denver, Colorado, and which contained one and three-fourths ounces of heroin was a viola-

tion of the Fourth Amendment. Trial counsel cited this for the same proposition, i.e., First Class Mail is protected against illegal search and seizure (RC 74).

Appellant in his brief at page 49 asserts that the Mail Cover was in violation of 18 U.S.C., §1703, and 39 CFR, §3.1, as did Lustiger's trial counsel (RC 73).

Lustiger and his trial counsel, at the original hearing on March 20, 1965, did not contest the assertion of the Government that there was no delay of the mail, nor *did he assert delay in the Affidavit*.

In *United States v. Costello*, (2nd Cir., 1958), 255 F.2d 376 at page 882; *United States v. Schwartz*, (Pa. 1959), 176 F.Supp. 613, Aff. (3rd Cir., 1960), 283 F.2d 107 at page 110; *Canaday v. United States*, (8th Cir., 1966), 354 F.2d 849 at 856; and *United States v. Coplon*, (S.D. N.Y., 1950), 88 F.Supp. 921, reversed on other grounds (2nd Cir., 1950), 185 F.2d 629, mail covers have been upheld.

It is respectfully submitted a mail cover, without delay, does not constitute an unreasonable search and seizure.

2. There were not sufficient grounds shown by Appellant for the disclosure of the Grand Jury Minutes, and therefore the Motion to Dismiss and the Motion for Disclosure were properly denied.

It is asserted by Appellant in his brief at page 49 that the pre-trial motion of Lustiger by his trial counsel (RC 30) for dismissal, or in the alternative disclosure of the minutes of the Grand Jury should have been made and cites the affidavit of trial counsel (RC 33-35) in the brief in support of his position. Appellant in the brief also cites all three cases

cited by trial counsel in the Memorandum filed in support of the Motion (RC 32).

They held as follows:

Abbott v. Superior Court of Pima County, (Ariz., 1959) 86 Ariz. 309, 345 P.2d 776, held that the Indictment returned by a state grand jury must be quashed where there was no quorum of the grand jury during the investigative portion *and* on the day they voted to return a true bill.

United States ex rel McCann v. Thompson, 2nd Cir., 1944), 144 F.2d 604, cert. den. 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630, which held that qualified grand jurors not present during all the evidence may vote (trial counsel cited this case as contra to his position).

United States v. Armour, (S.D. Calif., 1963), 214 F.Supp. 123, which held that grand jurors voting in an antitrust case do not have to be present at all the testimony.

In *United States ex rel McCann v. Thompson*, *supra*, at page 607, it was stated:

"... Since all the evidence adduced before a grand jury—certainly when the accused does not appear—is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote. Against this we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur;

but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character, in spite of the extreme difficulty of ever proving what was the evidence before a grand jury. Indeed, the possibility that not all who vote will hear all the evidence, is a reasonable inference from the fact that sixteen is a quorum. Were the law as the relator argues, it would practically mean that all jurors present at the beginning of any case, must remain to the end, for it will always be impossible to tell in advance whether twelve will eventually vote a true bill, and if they do, who those twelve will be. The result of such a doctrine would therefore be that in a long case, or in a case where there are intervals in the taking of evidence, the privilege of absence would not exist. That would certainly be an innovation, for the contrary practice has, so far as we are aware, been universal; and it would be an onerous and unnecessary innovation . . .”

There were sixteen grand jurors who attended both sessions (17 at the first two days and 20 at the second two days). To speculate that of these sixteen, much less the twenty, grand jurors there were not twelve grand jurors who did not have sufficient evidence upon which to return an Indictment is to presume grand jurors do not follow their oath.

It is respectfully submitted there was no real basis for the disclosure, and the Motion was properly denied.

3. The Indictment does not state an offense for violations of 18 U.S.C., §1341, and 18 U.S.C., 1341 is constitutional.

Appellant, in the brief at pages 50 through 53, asserts the same grounds as were asserted by the trial counsel of Appellant

in the pre-trial Motion to Dismiss for Lack of Jurisdiction; for Inadequacy of Evidence Before the Grand Jury to Sustain the Indictment; and in the Alternative that 18 U.S.C., §1341 and the Indictment are Unconstitutional, etc. (RC 36), and all of the cases cited by Appellant in the brief at pages 50 through 53 were cited by trial counsel (with the exception of *Giaccio v. Penn.*, (1966) 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 477), but not to the same purpose.

Cited for the proposition that the Indictment was defective as a matter of law in that it did not contain the elements of the offense charged; it did not sufficiently apprise the Appellant of what he had to be prepared to meet; it was not sufficiently definitive in its terms to pinpoint with accuracy the extent to which a defendant may plead a formal acquittal of (sic) conviction; and it did not set out the offense with sufficient specificity as to inform the Court of the facts alleged, so that it might decide whether they are sufficient in law to support a conviction (Opening Brief of Appellant, pages 50-51), is *Russell v. United States*, (1962) 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240. The *Russell* case involved the failure of a witness before a Congressional Committee to answer questions. The Indictment did not allege the subject of inquiry of the Committee so that the pertinency of the questions the witness failed to answer could not be tested.

At pages 763-764 the Supreme Court emphasized two protections an Indictment is intended to guarantee:

"These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet,' " and secondly, "'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

The Indictment in this case alleges the Appellant devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons (RC 1 lines 13-16). The Indictment, in paragraphs 2 through 6, alleges the steps he took in furtherance of the scheme (RC 3-5, line 27). The Indictment sets out in paragraph 7 the misleading, deceptive, false and fraudulent pretenses, representations and promises contained in the brochure "Join Us for Pleasure and Profit at Lake Mead City, Arizona" (Government's Exhibit 37 Series), (RC 6 thru 9, Line 6). Paragraph 8 alleges Lustiger misled and deceived the persons intended to be defrauded into believing that houses already existed in Lake Mead City and that water for drinking, boating, water-skiing, fishing and swimming sports was abundant, by means of photographs and misleading and false statements concerning those photographs appearing in said brochures (Government's Exhibit 37 Series), and by means of vicinity maps (Government's Exhibit 38 Series), and then sets them out with particularity (RC 10 thru 11, line 23). Paragraph 9 alleges Lustiger sent out plat maps (Government's Exhibit 28 Series) with a memorandum stating special care had been taken to select a lot or lots in the choicest area (RC 11). Paragraph 10 alleges Lustiger represented, by means of special price lists, special offering circulars (Government's Exhibit 40 Series), stating that only a few lots were left in the choice areas and that prices were rising and that they would never be able to purchase lots at such low prices again, whereas Lustiger well knew the prices were arbitrarily being raised (RC 12). Paragraph 11 alleges Lustiger wilfully and knowingly concealed facts which would affect the use of lots for residences; that Lake Mead City was scattered in five different townships and in each township the even numbered sections were reserved by the Government for grazing purposes; many of the sections contained rocky hills and unbridged natural drainage washes;

only a few sections were adjacent to existing county roads, and many sections were not accessible by ordinary passenger vehicles; some of the sections were separated from the other sections by a high mountain and deep natural washes; the nearest section to existing electric power and telephone lines was twenty-three miles, and the farthest was thirty-eight miles; most of the sections did not have streets for access to lots, the nearest section by existing motor vehicle roads or trails to Lake Mead was fifteen miles and the farthest was forty miles; and some of the sections were twenty-eight miles distant by existing road and jeep trails to the only assured source of drinking water (RC 12-14, line 4). The twelfth paragraph of Count I, and the last paragraph of the remaining Counts, allege that Lustiger caused a mailing to a particular person in furtherance of the scheme (Government's Exhibits 1 through 19).

In *John Dolack v. United States*, (9th Cir., April 7, 1967), No. 21,256, at page 7 of the slip sheet opinion, this Court quoted with favor from *Rivera v. United States*, (9th Cir., 1963), 318 F.2d 606, as follows:

"The Indictment alleged the offense substantially in the words of the statute which sets forth all the essential elements of the crime; . . . the indictment thus alleged an offense and identified the particular conduct upon which the charge was based to the extent necessary to protect appellant from double jeopardy and to tell him what he must be prepared to meet. This was enough to satisfy constitutional standards. . . ."

Compare the Information in *Dolack v. United States*, *supra*, footnote 2, and the Indictment in this case (RC 2).

It is respectfully submitted the Indictment meets the test set out in the *Russell* case.

Cited for the proposition that the great bulk of allegedly fraudulent statements were seller's talk and which held as follows:

Harrison v. United States, (6th Cir., 1912), 200 F. 662 (cited as 200 F.2d in Appellant's brief at page 51, but cited by his trial counsel correctly at RC 38, Line 14), which held that puffing within any reasonable grounds is not fraudulent within the meaning of the mail fraud statute, but at page 666 the Sixth Circuit stated:

"... fall in this same class, because, though the representation affects quality or performance, it directly pertains to a fact plain or inherent in the substantial identity—the essential characteristics—of the thing itself; and even though the original and underlying business is legitimate, the use being made of it is fraudulent."

The defendant sold "New Home Vacuum Cleaners" and "Easy Way Washers." The judgment was reversed, however, because the confession of the defendant admitted into evidence was wrongfully obtained.

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62, which was a charge of mail fraud involving the sale of knitting machines, but as the Court pointed out at page 80, although the initial contacts were made through the mail, the knitting machines were sold only after the buyers saw them demonstrated and were able to observe them in operation, and therefore the statements made by salesmen were clearly sales talk.

It is respectfully submitted that as alleged in Paragraph 10 in the Indictment (RC 12), Lustiger sent out circulars stating there were special offerings at special prices, urging the persons intended to be defrauded to buy now through the mail.

Cited for the proposition that the concealments or omissions in advertising attributed to the Appellant were not "criminal" since the Appellant was charged in some cases with not "clearly revealing" facts, are the following cases which held:

United States v. Kram, (3rd Cir., 1957), 247 F.2d 830, which held that if the Indictment charges that the solicitation was intentionally drawn to be misleading then the Government must prove it. The Court reversed the conviction on failure of proof. (The Third Circuit at page 832 holds that ordinarily there are only two elements—the intentional devising of a scheme to defraud and the use of the mails in carrying out that scheme).

United States v. McNamara, (2nd Cir., 1937), 91 F.2d 986, which reversed the conviction because the Second Circuit held the use made of the evidence of transactions at the end of the year to salvage the company and the closing argument of Government's counsel were highly prejudicial. The Court refused to consider whether concealed facts were properly submitted to the jury (p. 992).

Stubbs v. United States, (9th Cir., 1918), 249 Fed. 571, which held that an alleged scheme to defraud in exchanging property was not mail fraud since the alleged victim was told that she was not purchasing from the real buyer, and further, that it was not fraudulent for Stubbs not to reveal to her the real reason he recorded the contract, and that reason was to compel her to buy since he was compelled to buy.

Charles v. United States, (4th Cir., 1914), 213 F. 707, (cited by trial counsel at RC 41 line 15 to show where concealment type of misrepresentations have been upheld) where the Fourth Circuit affirmed a conviction for mail fraud where the defendant concealed the fact his checks were insufficient to

the victim who was issuing bills of lading in a series of transactions.

Williams v. United States, (9th Cir., 1960), 278 F.2d 535 (cited by trial counsel at RC 41 line 15 to show where concealment type of misrepresentations have been upheld) where this Circuit upheld a conviction where the defendant was kiting checks between Hawaii, Seattle and Denver and the defendant was concealing the insufficiency of the checks.

Haid v. United States, (9th Cir., 1946), 157 F.2d 630, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) where this Circuit upheld the conviction where the issue was impression testimony, the victim relied on the impression the defendant gave that he was an F.B.I. agent and the victim extended credit. The concealment that he was not an F.B.I. agent sustained the conviction.

Gregory v. United States, (5th Cir., 1958), 253 F.2d 104, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) where a conviction was affirmed for a scheme by a railway clerk who obtained and used pre-dated cancelled envelopes to enter a national football contest after the games were played.

Kreuter v. United States, (5th Cir., 1955), 218 F.2d 532, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) which affirmed a conviction and upheld the sufficiency of the Indictment which alleged the defendant deposited worthless checks and used the certificate of deposit to cash worthless checks, and which did not set out all the banks which were used.

Linden v. United States, (4th Cir., 1958), 254 F.2d 560, (cited by trial counsel at RC 41 line 16 to show where con-

cealment type of misrepresentations have been upheld) which affirmed a conviction where the defendant distributed solicitations for listing in a business directory and the solicitations were made to appear as telephone directory listings.

Silverman v. United States, (5th Cir., 1954), 213 F.2d 405, (cited by trial counsel at RC line 17 to show where concealment type of misrepresentations have been upheld) where a conviction was affirmed where a defendant used billings made to appear similar to telephone directory billings. The Fifth Circuit held that the scheme need not misrepresent any fact—all that's necessary is a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension and the use of the mails in its execution.

Cacy v. United States, (9th Cir., 1961), 298 F.2d 227, (cited by trial counsel at RC 41 line 18 as an example of an omission being an express misrepresentation) where this Court affirmed a conviction where the defendant's scheme was to sell an "exclusive" distributorship to different victims of the same machines, but using a different name for the machine.

It is respectfully submitted that "Water Plenty of Water" is a misrepresentation, for example, when the nearest available water well was eighteen miles to some of the sections, to give but one example.

Cited for the proposition by Appellant that the Indictment must allege someone was defrauded were the following cases and which held as follows:

Fushay v. United States, (8th Cir., 1933), 68 F.2d 205, (cited by trial counsel at RC 42 for the ruling in the Eighth Circuit) which held the criteria of civil fraud is applicable to criminal mail fraud; the Court held that an honest belief that

a corporation will make money is not justification for a misrepresentation.

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62 at page 76, (cited by trial counsel at RC 42 for the ruling in the Sixth Circuit) which held there must be proof of a person being defrauded. The Court held it to be an element.

United States v. Baren, (2nd Cir., 1961), 305 F.2d 527, (cited by trial counsel at RC 42 for the ruling in the Second Circuit), where the Second Circuit held there must be proof someone was defrauded and admittedly without authority for the holding at page 528, but at page 533 the Court acknowledges the important element is the intent.

United States v. Brunet, (W. D. Wis., 1964), 227 F.Supp. 766, (cited by trial counsel at RC 42 for the rule in the Seventh Circuit) is that the Indictment must allege persons have been defrauded. (This was a mail order school which would get graduates Civil Service jobs, etc.)

Moser v. New York Life Insurance Co., (9th Cir., 1945), 151 F.2d 396, (cited by trial counsel at RC 42 as the rule in this Circuit for civil frauds) where this Court held that in a civil action for fraud there must be a false representation to an existing fact.

Schlaadt v. Zimmerman, (9th Cir., 1953), 206 F.2d 782, (cited by trial counsel at RC 42 as the rule in this Circuit for civil frauds) where this Circuit held in a civil fraud case that the fraud may not be predicated upon mere non-performance of a promise. (A widow married decedent upon the promise decedent would leave his estate to her children).

Kern Copters, Inc. v. Allied Helicopter Service, Inc., (9th Cir., 1960), 277 F.2d 308, (cited by trial counsel at RC 42

as the rule in this Circuit on civil frauds) where this Circuit held in a civil fraud action there was no fraud for non-disclosure of the removal of parts since this could have been easily ascertained.

The Third Circuit, *United States v. Kram*, supra (247 F.2d 830), and the Fifth Circuit, *Silverman v. United States*, supra, (213 F.2d 405), hold the same as the Ninth Circuit has held. *Lemon v. United States*, (9th Cir., 1960), 278 F.2d 369, at page 373, citing *Kreuter v. United States*, a Fifth Circuit case, supra, (218 F.2d 532), with approval. *Farrell v. United States*, (9th Cir., 1963), 321 F.2d 409, 419. The Ninth Circuit rule was conceded by trial counsel at RC 42. (The Lemon case holds the mail fraud statute is designed to protect the most gullible and naive as well as the worldly wise.) Also, please see *Dolack v. United States*, supra, and *Pereira v. United States*, (1953) 347 U. S. 1 at page 8, 74 S.Ct. 358, 98 L.Ed. 435.

It is respectfully submitted that the Indictment does not have to contain allegations that someone was defrauded.

Cited for the proposition that inadequate evidence was presented to the Grand Jury, since Exhibit F (as referred to by Appellant in the Opening Brief at page 52, but which is Government's Exhibit 50 in evidence) was presented to the Grand Jury and negated any evidence of fraud, are the following cases and which hold as follows:

Harrison v. United States, (6th Cir., 1912), 200 F. 662, (cited as 200 F.2d 662 by Appellant in his brief at page 52, but cited correctly by trial counsel at RC 43) which held at page 670 that although initially the advertising literature first contained a promise to refund if the merchandise was not as represented, and that after a conference with the Post Office authorities the defendant then made an absolute promise to re-

fund, the trial jury must still determine that the refund offer was made in good faith.

Jeffries v. Olsen, (S. D. Cal., 1954), 121 F.Supp. 463 at page 473, which held that in this case, a civil case to set aside a fraud order by the postal authorities, the plaintiff made an *unqualified* assurance of refund if not satisfied in his advertising.

(See Government's Exhibit 50, which was attached to trial counsel's Affidavit as Exhibit F, at RC 108 at page 112, or as quoted by trial counsel in his Memorandum when he was urging this point, starting at RC 43. At RC 46, line 22 it is stated in this "refund letter": "As a concrete indication that the company is certain you will be satisfied with your purchase, and in line with the company's continuing policy of bending over backwards to assure the satisfaction of each and every customer, please be advised that any customer who inspects Lake Mead City prior to September 1, 1963, and is then dissatisfied with his purchase for any reason whatsoever, will be given the right at that time to sign a request for a full refund at the Information Office on the property, and that all requests so signed at that time will be honored."

Gold v. United States, (8th Cir., 1929), 36 F.2d 16, held at page 32 that good faith is a complete defense which involved stock manipulations.

Walters v. United States, (9th Cir., 1958), 256 F.2d 840, where this Circuit reiterated the rule at page 842 that good faith, i.e., lack of intent to defraud, is a complete defense. This scheme involved a sale of insurance company stock through the mails containing the representation that a motel chain was interested in the insurance company defendant was forming.

The "refund letter" of Appellant was not an unqualified offer of refund and was not made until after Lustiger was in-

terviewed by Postal Inspector Doyle Marshall, to-wit: November 10, 1962 (RT 358 L 1-3).

It is respectfully submitted there was adequate evidence before the Grand Jury to return an Indictment.

Cited for the proposition that the Indictment and 18 U.S.C.A. 1341 do not contain an ascertainable standard of guilt, at page 53 of the Opening Brief are the following cases and which held as follows:

Giaccio v. Penn., (1966) 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (the only case not cited by trial counsel in his pre-trial Memorandum, which Appellant has used in this portion of the Opening Brief, page 50 through 53), which held unconstitutional a Pennsylvania statute which provided in a misdemeanor case where defendant is acquitted the defense shall be assessed costs and committed to jail for non-payment if the jury finds "some misconduct."

Winters v. New York, (1948) 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (cited as *Winters v. United States* both by trial counsel at RC 47 and by Appellant at page 53), which held unconstitutional a New York statute as construed by the New York Court of Appeals, which prohibited distribution of magazines principally made up of criminal deeds of bloodshed or lust or crime since the statute failed to give adequate guidance.

Musser v. Utah, (1948) 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562, which held unconstitutional a Utah statute prohibiting a conspiracy to commit acts injurious to the public morals. (The Supreme Court reversed and sent back to the State Court to permit them to make this holding.)

Connally v. General Construction Co., (1926) 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, held a state statute uncon-

stitutional for providing cumulative penalties for failing to pay "current rate of per diem wages in the locality".

United States v. Cohen Grocery Co., (1920) 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, which declared unconstitutional the Food Control Act of 1917 which declared it to be a crime for charging "unreasonable" rates in handling necessities.

United States v. DeCadena, (N.D. Calif., 1952), 105 F.Supp. 202, at page 204, which held the terms of the Immigration Act for transporting aliens who had entered the country illegally when "he" knew the illegal entry had occurred within the last three years.

As was stated by trial counsel in his Memorandum at RC 48, the Supreme Court has not dealt with this aspect, but has in *Badders v. United States*, (1916) 240 U.S. 391, 60 L.Ed. 706, 36 S.Ct. 367, upheld the statute as constitutional.

It is respectfully submitted that the Indictment does set an "ascertainable standard of guilt".

(In footnote 17 on page 53 of the Opening Brief, Appellant alleges the pre-trial publicity was flagrant and "can hardly be overemphasized, nor was it possible for that publicity to have not affected the trial judge". Citing *Giles v. Maryland*, (1967) — U.S. —, 87 S.Ct. —, 17 L.Ed.2d 737, where the prosecutor took no steps to correct erroneous evidence, and *Sheppard v. Maxwell*, (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, which reversed for the carnival atmosphere at the trial. The footnote goes on to state the trial judge had arrived at an opinion prior to trial and had in mind the fact there was litigation over title to the land. These statements are not supported by the record, much less by fact. The Court was aware the title difficulties were stipulated to by the Gov-

ernment, as well as Lustiger, that they were not part of the fraud. (See Stipulation No. 10, paragraph 36, RC 228).

4. *The Indictment did not contain duplicitous counts.*

Appellant, at page 54 of the Opening Brief, asserts that each count failed to state an offense since the Indictment alleges Lustiger "placed or caused to place" the count letter and cites *Parr v. United States*, (1960) 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277, as authority for this point, i.e., Lustiger must have placed the letters in an authorized depository for mail himself. Futher, that the Indictment must be construed in a manner most favorable to the defendant, citing *Johnson v. United States*, (4th Cir., 1938), 95 F.2d 813, (a bank misapplication case, wilfully misapplied funds not sufficient).

Causing to be placed is sufficient, *Williams v. United States*, (9th Cir., 1960), 278 F.2d 535.

Appellant then goes on to allege each count is duplicitous, citing the following cases and which hold as follows:

Empire Oil and Gas Corporation v. United States, (9th Cir., 1943), 136 F.2d 868, which held at page 872 an Indictment under the Food and Drug Act that charged the commission of one offense in two ways was not duplicitous.

United States v. Martinez-Gonzales, (S.D. Calif., 1950), 89 F.Supp. 62, held that one count charging the smuggling of four aliens was duplicitous.

Appellant concedes that there are cases which hold that alleging both a scheme to defraud and a scheme to obtain money by false pretenses is not duplicitous. *United States v. Culver*, (D. My., 1963), 224 F.Supp. 419. See also *Silkworth v. United States*, (2nd Cir., 1926), 10 F.2d 711.

It is respectfully submitted each count is not duplicitous.

5. *The Brady v. Maryland Motion was not denied and the Trial Court did not abuse its discretion in denying the Motion for Bill of Particulars.*

Appellant cites *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Barbee v. Warden, Maryland Penitentiary*, (4th Cir., 1964), 331 F.2d 842; *United States v. Wilkins*, (2nd Cir., 1964), 326 F.2d 135, for the authority that the prosecution must reveal evidence favorable to defendant. The Motion was not denied. The Order entered by the Trial Court on April 15, 1965 (RC 327) permitted Lustiger to renew at the close of the Government's case. These files (all the questionnaires and correspondence of Postal Inspector Marshall) were made available to Lustiger's trial counsel on June 5 and 6, 1965, and he inspected them. The list of Lustiger's witnesses was then filed on June 7, 1965 (RC 328). At the time of pre-sentence investigation by the Federal Probation Officer, he was given these files.

It is respectfully submitted *Brady v. Maryland* was more than compiled with.

Appellant asserts, at page 56, that it was prejudicial error to deny the Motion for a Bill of Particulars, citing the following cases and which held as follows:

Williams v. United States, (9th Cir., 1961) 289 F.2d 598 at page 601, this Circuit held it was not an abuse of discretion to deny a Motion for a Bill of Particulars unless the defendant is acutely surprised at trial, wherein this motion requested the geographic location of the acts charged by the Government.

Yeargain v. United States, 9th Cir., 1963), 314 F.2d 881 at page 882, this Circuit held the purpose of a Bill of Particulars

is to protect a defendant from double jeopardy and to prepare his defense, but the defendant is not entitled to know all the evidence but is entitled to know the Government's theory of the case.

United States v. Solomon, (S.D. Ill., 1960), 26 F.R.D. 397, held the defendant was entitled to the Bill of Particulars.

In this case, the Motion for Bill of Particulars was denied on April 15, 1965, (RC 327-328), after the first pre-trial conference was stipulated to by Lustiger personally and was held, and the first nineteen exhibits were marked and tentative stipulations presented to Lustiger and his counsel concerning the balance of Government's exhibits were shown to them. Thereafter, a pre-trial hearing was held on April 29, 1965, and the main exhibits of the Government were marked into evidence, i.e., Exhibits 20 through 54. On May 14, 1965, Stipulation No. 4 (RC 208), listing the Government's witnesses, was filed (RC 328).

This procedure afforded a full preview of the Government's case.

It is respectfully submitted there was no abuse of discretion by the Trial Court in the denial of the Motion for the Bill of Particulars.

6. The charges in the Indictment do not violate Appellant's First Amendment right to free speech.

Appellant argues at pages 57 and 58 that the entire brochure "must be examined and not just portions thereof taken out of context". Appellant cites five obscenity cases at pages 57 and 58 which hold portions must not be read out of context.

Appellant ignores Government's Exhibit 37 Series. Exhibit 37 listed the six different printings of the brochure and Exhibit 37a through f was a brochure from each printing.

In *In the Matter of Jackson, supra* (96 U.S. 727), the Supreme Court, in passing on the Federal statute prohibiting the sending of lottery matter through the mail, held at pages 736-737 that it was not a restriction on the freedom of speech but constituted a refusal by the Government of its facilities for the distribution of matters injurious to the public morals.

In *Commissioner of Internal Revenue v. Heininger*, (1943) 320 U.S. 467, 88 L.Ed. 171, 64 S.Ct. 249, the Supreme Court stated:

"The single policy of these sections (the Postmaster's stop order statute) is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators; such punishment is provided by separate statute (citing 18 USCA §338, now §1341) and can be imposed only in a judicial proceeding in which the accused has the benefit of constitutional and statutory safeguards appropriate to the trial for a crime."

The Supreme Court has thus recognized the power of Congress to restrict the use of postal facilities from fraudulent practices in a civil stop order.

It is respectfully submitted there is no deprivation of the Appellant's right to free speech.

7. There was sufficient evidence to find Appellant guilty beyond a reasonable doubt, there being an ascertainable standard of guilt under the offense charged, and proof of someone being defrauded is not an element of the offense.

Appellant cites as authority for the insufficiency of the evidence at pages 58 and 59 of the Opening Brief cases which were reversed for prejudicial comments in closing arguments:

Griffin v. California, (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 1206; and *Wilson v. United States*, (1893) 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; or which held proof insufficient that defendant was not a citizen in a false claim of citizenship: *Colt v. United States*, (5th Cir., 1946), 158 F.2d 641; or that the defendant doesn't have to prove who stole coupons (conviction affirmed), *United States v. Bennett*, (2nd Cir., 1945), 152 F.2d 342; or reversed on the Court's instruction on presumption of innocence, *Boatwright v. United States*, (8th Cir., 1939), 105 F.2d 737.

The last three cases cited at the top of page 59 are state cases.

Kaplan v. United States, (9th Cir., 1964), 329 F.2d 561, is in point which holds the test of circumstantial evidence is that reasonable minds can find the evidence excludes every hypothesis but that of guilt and evidence on appeal is construed in a light most favorable to the Government. Also *Mickelson v. United States*, (9th Cir., 1965), 346 F.2d 952 at 954.

The sufficiency of the evidence is discussed in the Government's Memorandum in Opposition to the Motion for Judgment of Acquittal which is at RC 306, which makes reference to the Memorandum in Support of the Motion for Judgment of Acquittal found at RC 243. (The Court will possibly feel this to be improper, but in view of Appellant's mere assertion of the insufficiency of the evidence, giving no discussion of it, the Government is unable to argue against points not given by Appellant.)

Appellant then argues there was no specific wrongful intent, citing *Morissette v. United States*, (1952) 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, which involved a charge of receipt of stolen government property and no instruction on the knowl-

edge of defendant that it was stolen was given; and *Williams v. United States*, (9th Cir., 1960), 278 F.2d 55, cited earlier in this brief, which was a mail fraud case involving a check kiting scheme where the defendant made full restitution. This Court held intent was for the jury and they so found.

Appellant next asserts "the undeniable good faith exhibited by the Appellant", citing again *Gold v. United States*, (8th Cir., 1929), 36 F.2d 16, which holds good faith a complete defense, and *Walters v. United States*, (9th Cir., 1958), 256 F.2d 840, which holds good faith a complete defense and the government must establish beyond a reasonable doubt that the defendant intended to devise a scheme to defraud and to obtain money.

The recital of the evidence adduced at trial in the Statement of Facts establishes the lack of good faith. The refund letter, Government's Exhibit 50, was conditional upon a trip by the buyers who were scattered throughout the country and who would have had to expend in all probability the same amount of money as they had invested to get there.

Appellant then reasserts that the Indictment and the statute do not contain an ascertainable standard of guilty, citing *Giaccio v. Pennsylvania*, supra (382 U.S. 399), the Pennsylvania assessment of costs statute, and *Bowie v. Columbia*, (1963) 378 U.S. 347, 84 Sup.Ct. 1697, 12 L.Ed.2d 894, which reversed a conviction which was based on a retroactive application to a new construction of a criminal trespass statute (construed to cover those who refused to leave premises after having been given notice to leave).

Appellant then again asserts the Government failed to prove any one was defrauded, and cites again *United States v. Rabinowitz*, (6th Cir.), supra; *United States v. Baren*, (2nd Cir.), supra; *United States v. Brunet*, (Wis., 7th Cir.), supra;

and *United States v. Schwartz*, (N.D. Cal., 1915), 230 F. 537 (and not in 230 F.2d as cited by Appellant on page 60), which held Indictment must allege lots valueless.

Compare *Norton v. United States*, (9th Cir., 1937), 92 F.2d 753, which held the Government does not have to prove any one was misled; *United States v. Whitmore*, (S.D. Calif., 1951), 97 F.Supp. 733; and *United States v. New South Farm and Home Co.*, (1916) 241 U.S. 64 at p. 71, 36 S.Ct. 505.

8. *The testimony of rancher James M. Smith's opinion as to the value of the land was not material, nor was the evidence of the advertising of adjacent land developments material, much less the advertising of land developments in other states, nor was the opinion of the former President of the Arizona League of Land Developers of the advertising of the Appellant admissible, nor was there error in admitting Government's Exhibit 42.*

Appellant asserts the exclusion of evidence of James M. Smith as to his opinion of value was objected to by the Government as not material and sustained by the Trial Court on materiality and beyond the scope of direct (RT 219 L 11-25), and cites *Farrell v. United States*, (9th Cir., 1963), 321 F.2d 409, which was a mail fraud and a securities violation prosecution; and value is admittedly material in a securities case; *United States v. Bloom*, (2nd Cir., 1956), 237 F.2d 158, which held at page 164 that the Court's instruction that proof of value of diamonds was so slight as to be negligible constituted reversible error.

But in *United States v. New South Farm & Home Co.*, (1916) *supra*, at page 71, the Supreme Court stated:

"... Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be ex-

pressed), that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. *An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces.*"

(Emphasis added)

The Indictment did not allege the value of the land to be misrepresented; the objection made by the Government was on the basis the value of the land had not been raised (RT 219 L 19-23).

Appellant then argues at length the evidence, which was rejected, as to "standards of the industry" and related values.

Pictures of adjoining developments were admitted, but the advertising material was rejected. If these were admitted then the Government would have been entitled to show the truth or falsity in these advertising materials and the Court would then in effect be trying not one Indictment but a possible five or six mail fraud cases.

Cited in support of this contention at page 70 of the Opening Brief are the following: *United States v. Brandt*, (2nd Cir., 1952), 196 F.2d 653, which held evidence of other

charitable organizations hiring professional fund raisers should have been admitted; *United States v. Sprengel*, (3rd Cir., 1939), 103 F.2d 876, which was reversed for prejudicial reference to a co-defendant having pleaded guilty, the evidence was overwhelming; *Silkworth v. United States*, (2nd Cir., 1926), 10 F.2d 711, which held evidence of what partners of defendant were doing and what other firms that the defendant came into contact with were doing were admissible as circumstantial evidence of the defendant's knowledge of it.

But in *Hoffman v. United States*, (10th Cir., 1965), 353 F.2d 188, the Tenth Circuit held evidence of adjoining land developments was immaterial.

Appellant asserts the opinion of the former President of the Arizona League of Land Developers of the advertising material of Lustiger should have been admitted. A reading of his "opinion" of the advertising as quoted on page 70 shows that it is an opinion or conclusion as to the ultimate fact in issue in a field which a trier of fact does have first hand knowledge (i.e. — sanity and psychiatrists; wind turbulence and physicists; etc). Further, the Government could then show, if the opinion was admitted, what land development operations advertising was false, etc.

Appellant, at pages 70-71, cites the following cases:

United States v. West Coast News Co., (W. D. Mich., 1964), 228 F.Supp. 171, which involved a charge of transporting obscene material; the Court rejected the offer of other books because the defendant did not lay the foundation of showing similarity to the allegedly obscene material and the acceptance by the community of these books. (Standards of the community were material at that time, 1964, on determining obscene material).

Sheldon v. Moredal, (S.D. N.Y., 1939), 29 F. Supp. 729, which was a civil copyright suit and which held the testimony of an expert should be admitted as to the number of additional patrons because of the added attractions, the alleged copyrighted material. (Trier of fact would not have first hand knowledge).

United States v. Wood, (4th Cir., 1955), 226 F.2d 924, which involved the seizure of mis-branded drugs (allegedly for treatment of diabetes). The Trial Court rejected expert opinion offered by the Government since the opinion was based on the testing of animals and not human beings. The Fourth Circuit reversed and directed judgment be entered for the Government. (Trier of fact would not have first hand knowledge.)

Rolf v. Bird, (5th Cir., 1956), 239 F.2d 257, was a civil tort action and the Fifth Circuit held the expert should have been permitted to testify that the loading caused the loss of the vessel. (Trier of fact would not have first hand knowledge.)

Appellant further cites three state cases.

Appellant then contends that Government's Exhibit 42 should not have been admitted. It was the deed used by Lustiger. Trial counsel raised this in the post-trial motion (RC 301 L 18 — most of the points raised by Appellant, with the exception of free speech, — Appellant's VI, were raised in the pre-trial and post-trial motions by trial counsel).

If the deed were not offered, then Lustiger would contend the Government was inferring he didn't issue deeds. And if it were admitted, where's the harm or error?

Appellant contends that the relevancy of Exhibits B and B-1 was to show Palm Springs in a checker-board pattern and therefore checker-board patterns are no real impediment to

development of a thriving city, but the point is what was stated about the checker-board pattern in Lustiger's advertising material. The vicinity map (Exhibits 38, 38a and 38b) sent with the offer (Exhibits 40 through 40i), and the brochure (Exhibits 37a through f), to every person answering the ad, did not show this.

Appellant next argues that Exhibit D, the Government's brochure for developing tourism, should have been admitted to show what the Government encourages. But in what way can it be argued that the Government encourages showing pictures of items and represented as being within the boundaries of Lake Mead City, but not revealed as being on private land not owned by the developer? (Please see allegations contained in paragraph 8 of Count I of the Indictment at RC 10 and 11).

It is respectfully submitted the rejected evidence was properly rejected and Government's Exhibit 42 was properly admitted.

9. Appellant was afforded effective assistance of counsel at trial.

Appellant argues that trial counsel was incompetent at trial and refers to the Affidavit of Lustiger filed with the Motion for New Trial on January 6, 1967.

Lustiger contends:

"During the course of the trial I had many discussions with Mr. Madden about my testifying. I continually stated to Mr. Madden that I wished to testify. I was informed at that time by Mr. Madden's law partner, Mr. Shaper, that he was also of the opinion that I should testify and he so informed Mr. Madden. Mr. Madden stated he did

not think I should testify and naturally I was following the advice of my attorney when I did not testify. I believe I would have been able to convince the Court that I never at any time conceived of any scheme to defraud any person and that the material contained in the brochures sent out to the public was true to the best of my knowledge, information and belief and was represented to the public in good faith. I further believe that I would have been able to show to the Court that there were no dissatisfied customers or any complaints until after the Post Office Department representatives had lectured prospective Grand Jury witnesses/customers on the alleged frauds which I had committed before these witnesses testified before the Grand Jury and this Court."

Lustiger states his conclusion he would have convinced the Court of his good faith. Madden made the decision not to put him on. His partner, John S. Schaper, who is an able attorney, does not have the trial experience of Jack Madden. What could have happened to Lustiger on cross-examination? Why did he maintain business records in California, but ship his mailings to Juanita Tincher Ley by bus for mailing from Phoenix, and she in turn would mail them from Phoenix? (RT 80-81).

Why would he, having sent the checks for payment for recording in his National City Land Company office, have her deposit them in a Phoenix bank?

Was he trying to avoid registration with the California Real Estate Department?

Was he planning to move to Arizona, and had he moved to Arizona at the time of trial?

Was not Lustiger taken out on the land by Smith's fore-

man, Victor Christiansen, (RT 291 L 2-3) and shown what land Lustiger had requested to see that he had bought? (RT 256).

Lustiger contends in his Affidavit that Mrs. Van Valkenburg (at page 5, lines 5-6) would have impeached Christiansen's statement that his children didn't use the stock tank, and Madden refused to put her on. Christiansen stated they did use it five or six times (RT 291 L 2-3). Where is the impeachment?

Appellant, in the Motions, contended Madden was incompetent during trial, but in the brief concedes on page 72 in the second paragraph:

"Necessarily, the record does not disclose the inadequacy of counsel. . . ."

Most of the research for Appellant's Opening Brief was done by trial counsel. The points trial counsel made with it are not included. Trial counsel, in his Memorandum in Support of the Motion for Judgment of Acquittal and for New Trial, wrote Appellant's Statement of Facts and paraphrasing of Indictment. (Compare Summary of Indictment, pages 7 to 13 of the Opening Brief to Madden's in the said Memorandum (RC 243 through 249), and compare the summary of the evidence in the Statement of Facts at pages 13 to 44 of the Opening Brief to Madden's at RC 249 through 280.)

The decision not to put a defendant on the stand is not grounds for declaring counsel incompetent.

The cases cited by Appellant involve a defendant, an attorney, who objected to appointed counsel who also represented co-defendants — *Glasser v. United States*, (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; trial counsel who didn't object

to admission of two confessions, offered no testimony and didn't consult with defendant during trial — *Brubaker v. Dixon*, (9th Cir., 1962), 310 F.2d 30; trial counsel who represented other party in transactions with which the trial was involved, *Cord v. Smith*, (9th Cir., 1964), 338 F.2d 516; trial counsel who failed to interview Government's main witness prior to trial and who didn't cross-examine the witness effectively at trial, and which witness trial counsel represented civilly, *Tucker v. United States*, (9th Cir., 1956), 235 F.2d 238; an attorney who advised defendant not to answer questions before the grand jury which would incriminate that attorney's other clients, *Randazzo v. United States*, (5th Cir., 1964), 339 F.2d 79; trial counsel who represented victims of burglary from time to time and who didn't cross-examine those victims as witnesses in their identification of the accused, *United States ex rel, Miller v. Myers*, (E.D. Pa., 1966), 253 F.Supp. 55; trial counsel who interprets prosecution's closing argument to state his theory of case is wrong, and the prosecution witnesses are reliable, *People v. Davis* (Cal., 1957), 48 Cal. 2d 241, 309 P.2d 201.

Errors in judgment (if there were any in this instant case) are not grounds for declaring counsel incompetent, *Lyons v. United States*, (9th Cir., 1963), 325 F.2d 370, cert. den. 377 U.S. 969, 84 S.Ct. 1650, 12 L.Ed. 2d 728.

As this Court stated in *Enriquez v. United States*, (9th Cir., 1964), 338 F.2d 165 at p. 167:

"[3] What appear to be Cura's two principal points apply commonly to the validity of his conviction on both of the counts with which he was charged. These points are: (a) that he was not afforded the effective assistance of counsel in the preparation and trial of the case, and (b) that certain evidence highly prejudicial in nature was erroneously admitted. Neither point has merit.

“(a) Cura’s counsel was retained .He had been an attorney for over twenty years. For the first five of them he was a member of the staff of the City Attorney of Los Angeles and had appeared in court almost daily prosecuting cases ;since that time he has contiuously carried on a successful private practice there, devoted almost exclusively to the defense of persons charged with the commission of criminal offenses. And the record in this case clearly discloses a vigorous defense conducted by capable counsel having a knowledgeable grasp of the facts and a keen desire for the welafre of his client. We fully agree with the able trial judge who, in appraising the quality of the trial judge who, in appraising the quality of the defense effort and the competence of counsel, declared ‘[t]he case was well tried* * *’.

“In reaching this conclusion we have not overlooked the fact that during the trial Cura expressed to the judge considerable dissatisfaction with his lawyer, and asked for (and was allowed) time to make a change. He did in fact then engage his present counsel ,but the latter declined to assume the defense at that stage of the proceedings and merely acted as associate counsel. Present counsel is highly critical of the efforts of his predecessor. Such an attitude, unfortunately, is not unusual in the legal profession; but as we observed not long ago in *Audett v. United States*, 265 F.2d 837, 844 (9th Cir. 1959), ‘After all, there are few trial lawyers who, on examining the record of a trial critically, would not say that “they might have done better”. But such surmises would not warrant this Court in branding the defense in this case as so inadequate as to amount to denial of the right tocounsel.’ ”

See also *Nelson v. People of the State of California*, (9th Cir., 1965), 346 F.2d 73 at p. 81, (a decision by counsel to

which defendant disagreed does not make that counsel's representation ineffective).

" . . . Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel."

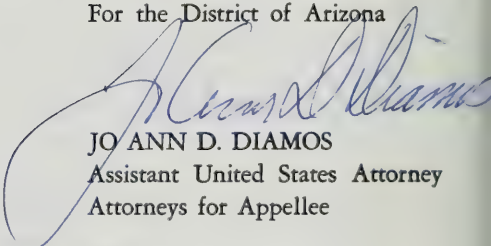
It is respectfully submitted Lustiger had effective assistance of counsel at trial, and really from that same counsel, assistance on this appeal.

VI. CONCLUSION

It is respectfully submitted that for all the foregoing reasons the judgment of conviction should be affirmed.

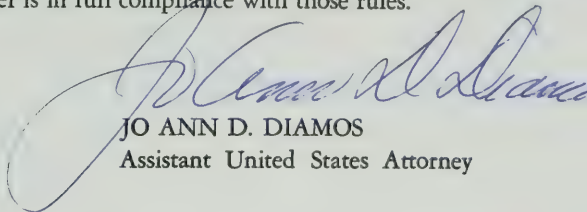
Respectfully submitted,

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For the District of Arizona



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Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS

Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this 29th day of May, 1967, to:

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Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 20967

On appeal From the Judgment of
The United States District Court
For the District of Arizona

* * * * *

SUPPLEMENTAL BRIEF FOR APPELLEE

ON SUFFICIENCY OF EVIDENCE

* * * * *

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FILED

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SUPPLEMENTAL BRIEF FOR APPELLEE

ON SUFFICIENCY OF EVIDENCE

* * * * *

This Supplemental Brief on the Sufficiency of the
Evidence is submitted pursuant to the Order entered on July
3, 1967 at oral argument before Chief Judge Richard H.
Chambers, Judge Frederick G. Hamley and Judge Walter Ely.

A discussion of cases cited by Appellant in his opening
brief on the sufficiency of the evidence is on pages 36-39 of

Appellee's brief, as well as cases cited by Appellee in support of its position.

In Appellant's reply brief, Appellant states that a portion of paragraph 7 of the Indictment is "puffing or seller's talk", and cites the following cases in support of this:

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62, which involved the sale of knitting machines; contacts to sell the knitting machines were made through the mails, but the machines were sold only after the prospective buyer was visited by a salesman and had the machine demonstrated to him.

United States v. Staples, (D.Ct., W.D. Mich., 1890), 45 Fed. 195, involved a defendant who advertised seed wheat for sale but who did not send it when the money was received, and who also advertised blueberry plants for sale but sent buyers wild huckleberry plants. The Court, in its charge, asked the jury to decide if it was puffing as to value and the exaggerations of normal business or was it actually fraudulent representation or downright deception.

Faulkner v. United States, (5th Cir., 1907), 157 Fed. 840, involved the advertising of a cold storage plant, including the satisfaction of customers. The proof offered was that he didn't pay off all claims, but he did pay most of the claims.

There was no falseness shown in the facilities of the cold storage plant.

This Circuit held in Lemon v. United States, (9th Cir., 1960), 278 F.2d 369, at page 373: "No actual misrepresentation of fact is necessary to make the crime complete." In fact, ". . . the lack of guile on the part of those solicited may itself point with persuasion to the fraudulent character of the artifice."

In Appellant's reply brief, Appellant states the Government must show someone was defrauded and cites two cases in support of this - - a Sixth Circuit case and a Seventh Circuit case:

United States v. Rabinowitz, supra, (see discussion supra).

Milner v. United States, (7th Cir., 1909), 174 Fed. 35, which involved a scheme to sell shares of stock by offering certain jobs as managers of branch offices they wanted to establish. The Indictment did not allege the shares of stock were not worth the price paid.

The rule in the Ninth Circuit is, as was stated in Farrell v. United States, (9th Cir., 1963), 321 F.2d 409, at page 419, citing Fourth and Ninth Circuit cases, that the Government is not required to prove that someone sustained a loss.

Also please see Pereira v. United States, (1953), 347 U.S. 1, at page 8, 74 S.Ct. 358, 98 L.Ed. 435, and United States v. New South Farm & Home Co., (1916), 241 U.S. 64, at page 71, 36 S.Ct. 505.

The rule on the construction of evidence on appeal in this Circuit is set out in Kaplan v. United States, (9th Cir., 1964), 329 F.2d 561. Also, Mickelson v. United States, (9th Cir., 1965), 346 F.2d 952, at 954.

The evidence offered at trial will be discussed in relation to the allegations of the Indictment.

Paragraph 1 alleges the Appellant, Marvin Lustiger, devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent representations and promises from numerous persons scattered throughout the United States, and lists forty-seven people, but not limited to them as people intended to be defrauded, by means of false and fraudulent devices, pretenses, representations and promises to purchase lots in that subdivision known as Lake Mead City, in Mohave County, Arizona. (The list of forty-seven people Postal Inspector Marshall had prior to the inspection of the corporation's books, and they were found to be included in the corporation's books. RT 398, L 10-21).

Paragraph 2 of the Indictment alleges the organization of Lake Mead Land and Water Company, an Arizona corporation, on September 7, 1960, by the Appellant, who was an officer and director thereof, and caused it to transact business in Arizona. (Government's Exhibit 20 which consists of the Certificate and Articles of Incorporation, and the annual report listing the officers and directors. See also Paragraphs 1, 2, 3, 4, 5 and 6 of Government's Exhibit 58).

Paragraph 3 of the Indictment alleges:

"3. It was a further part of said scheme and artifice to defraud that the defendant would and did represent to said persons intended to be defrauded, and pretend by using the address of Post Office Box 13349, Phoenix, Arizona, as the mailing address of Lake Mead Land and Water Co., that the said Lake Mead Land and Water Co. operated from headquarters at Phoenix, Arizona, whereas, in truth and in fact, as the defendant well knew at the time, the aforesaid pretense and representation were misleading, deceptive and false when made."

This was established by the testimony of Juanita Tincher Ley (RT 78-84), Government's Exhibit 21, which is the application for Box 13349 in Phoenix, Arizona, and Postal Inspector D. C. Marshall's interview of Marvin Lustiger on November 10, 1962, (RT 358, and 362, L 3-11), which showed that Lake Mead

Land and Water Co. did not have headquarters or an operating business office at Phoenix, Arizona; the principal business of Lake Mead Land and Water Co. was handled from 236 East Foothill in Azusa, California; mail for Lake Mead Land and Water Co. delivered to Post Office Box 13349 at Phoenix, Arizona, was picked up by Juanita Tincher Ley and forwarded to 236 East Foothill, Azusa, California, for opening and processing; and correspondence of Lake Mead Land and Water Co. directed to the persons intended to be defrauded was prepared at Azusa, California, and mailed under cover to Lake Mead Land and Water Co. at Post Office Box 13349, Phoenix, Arizona, for re-mailing at Phoenix, Arizona, by the hired representative of Lake Mead Land and Water Co. so that mailings made by Lake Mead Land and Water Co. to the persons intended to be defrauded would be postmarked at Phoenix, Arizona.

Paragraphs 4, 5 and 6 of the Indictment alleged the offering for sale of the lots in Lake Mead City through advertisements in newspapers, magazines and publications throughout the United States on a time payment plan.

See Exhibit 27 for the number of Sections. The Appellant advertised in publications whose total circulation had national coverage (Government's Exhibits 36 and 36a).

Over 3000 lots were sold under contract (see Government's Exhibit 44) of a total of over 6800 lots in twenty

sections scattered over five townships (see Government's Exhibit 26). See Exhibit 44 listing the contracts for payment.

Paragraph 7 of the Indictment alleged as follows:

"7. It was a furtherpart of said scheme and artifice to defraud that the defendant would and did, for the purpose of inducing said persons intended to be defrauded to purchase lots or parcels or contract for the purchase of lots or parcels in the said Lake Mead City subdivision units, send and cause to be sent by the United States mails to said persons intended to be defrauded advertising brochures or booklets published by Lake Mead Land and Water Co., and entitled 'Join Us for Pleasure and Profit at Lake Mead City, Arizona,' which said advertising brochures or booklets contained the misleading, deceptive, false and fraudulent pretenses, representations and promises hereinafter described as follows, well knowing at the time that said pretenses, representations and promises would be and were misleading, deceptive, false and fraudulent when made:

"(a) 'Join us for Pleasure and Profit at Lake Mead City, Arizona'" (On cover page of Government's Exhibits 37a through 37f).

"(b) 'Lake Mead City...an enchanted city in the

making, a truly outstanding New Frontier for wise investors.'" (Page 4 of Government's Exhibits 37d, 37e, 37f).

"(c) 'Lake Mead City. Arizona's best located planned community.'" (Page 4 of Government's Exhibits 37a, 37b, 37c).

"(d) 'Invest in this booming area now.'" (Page 9 of Government's Exhibits 37a, 37b, 37c).

"(e) 'Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers.'" (Page 4 of Government's Exhibits 37d, 37e, 37f).

"(f) 'Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona.'" (Page 3 of Government's Exhibits 37a through 37f).

The use of the words "Lake Mead City" in the subdivision name and the phrases "as activity increases," "as the community progresses," "an enchanted city in the making," "Arizona's best located planned community," "best planned," and "community development," frequently repeated in the said advertising, were intended to cause the persons intended to be defrauded to believe that a city or community of residents, planned by Lake Mead Land and Water Co., was

already started and rapidly growing and that its future continued rapid development and growth were assured by the plans being executed and put into effect by Lake Mead Land and Water Co., whereas no city or community of residents or building improvements of any kind existed then and up to March, 1963 did exist on any of the said Lake Mead City subdivision units, except for the small office building used as a field office by Lake Mead Land and Water Co. and a temporary type dwelling occupied by the caretaker and guide employed by Lake Mead Land and Water Co., which are situated on subdivision unit 23-29-17. In Paragraph 37 of Stipulation No. 3, at RC 204, are listed five houses, some of which were begun in March, 1963 and one was completed in 1965, which at the time of trial were all that existed on Lake Mead City. Needless to say, Lake Mead City never was incorporated as a city or town - - see Stipulation, Paragraph E of Government's Exhibit 116.

Lake Mead Land and Water Co. did not intend to construct or provide housing or shopping facilities or provide the utilities necessary to the development of a city or sizeable community of residents on said Lake Mead City subdivision units, and there was no assurance that a city would ever develop thereon; that there would be any community development or that activity would ever increase on the said

Lake Mead City subdivisions, except for the possible installation by Lake Mead Land and Water Co. of additional rough dirt streets, street signs, lot stakes and identification markers, which activity has not as yet resulted in any permanent occupants locating in any of the said subdivision units, and there is no assurance that it ever will. (See Lustiger's interview by Postal Inspector Marshall at RT 365 to 366, L 16).

Whether a city or community of residents will ever develop on the said Lake Mead City subdivisions is wholly dependent on whether persons who purchase lots therein will ever occupy the property and provide the housing, utilities, shopping facilities and other facilities and conveniences necessary to the growth and development of a city or community, at their own expense, which is unlikely because of the remoteness of the location from existing utility services, the scattered checker-board pattern of the subdivision units, with grazing land interspersed, and the inaccessibility of the said subdivision units by ordinary motor vehicle. (See Government's Exhibit 58, Paragraphs 20, 21, 22, 23 and 24).

Lake Mead City is not Arizona's best located or best planned community or one of the best planned resort areas in Arizona and Lake Mead City planning and restrictions do not assure purchasers of lots in the said Lake Mead City subdivisions of properties that will always be favorably looked upon

by discriminating purchasers. In truth and in fact, the lack of proper planning for community development purposes prohibits the probability or possibility of a city or orderly community ever developing on the said subdivision units, for the following reasons:

Said subdivision units comprise only odd-numbered sections of land widely scattered geographically in five different townships, in which said townships the even-numbered sections are owned by the Federal Government and subject to use for grazing purposes. (See Government's Exhibit 27).

Some of the said subdivision units are separated from others by a high mountain and deep natural drainage wash, it being a distance of approximately 28 miles between some of the said units by existing roads and jeep trails not traversable with an ordinary automobile.

Most of the said subdivision units are not accessible by ordinary motor vehicle because of the lack of passable roads, and there are numerous rocky hills and unbridged deep washes thereon. (See map, Exhibit 27 and photographs, Exhibits 108, 109, 110, 111, 112 and Doyle Marshall's description of the 1000 foot high Grand Wash Cliffs - RT 378 and 388).

"(g) 'When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly.'" (Page 3 of Government's Exhibits 37d, 37e, 37f).

"(h) 'When development takes place, such as in Lake Mead City, history shows that land values rise rapidly.'" (Page 3 of Government's Exhibits 37a, 37b, 37c).

"(i) 'Seldom, if ever, will you find it possible to purchase so much good land for such a low price.'" (Page 3, Exhibits 37a through 37f).

"(j) 'You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona.'" (Page 5 of Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(k) 'The best located resort property in the West.'" (Page 9 of Government's Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(l) 'Location more than any other factor, determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting within the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned,

deeded properties in Lake Mead City. Get yours now!'" (Page 8 of Exhibits 37d, 37e, 37f).

"(m) 'Most of the region shown on this map consists of Federal land, and is not available at any price. This makes the choice privately-owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured.'" (Page 16 of Exhibit 37d, 37e, 37f).

"(n) 'Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivision has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens.'" (Page 17 of Exhibits 37d, 37e, 37f).

"(o) 'Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues.'" (Page 17 of Exhibits 37a, 37b, 37c).

"(p) 'Thousands of wise investors have already decided that our special offering represents a worthwhile

holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property.'" (Page 31 of Exhibits 37d, 37e, 37f).

The Lake Mead City subdivision properties are not choice land, in a choice location, an American paradise, the best located resort property in the west, or among the finest properties ever offered for sale in the State of Arizona, for the following reasons:

The said subdivision properties are remote from existing highways, the nearest of said subdivision units being approximately 40 miles distant from U. S. Highway 66 and approximately 30 miles distant from U. S. Highway 93, and the farthest of said subdivision units being approximately 54 miles distant from U. S. Highway 66 and approximately 44 miles distant from U.S. Highway 93, the nearest hard surfaced highways. (Marshall's testimony, RT 392-393).

The nearest of said subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles distant from the nearest existing electric power and telephone lines. (Marshall's testimony, RT 393).

Most of the said subdivision units are not accessible by ordinary motor vehicle because of lack of passable roads. (Marshall's testimony, RT 376).

Streets for access to lots, street signs, lot stakes or identification markers have not been provided in 19 of the 20 existing subdivision units. (Marshall's testimony, RT 365, lines 1 and 2).

Most of the said subdivision units have numerous rocky hills and unbridged natural drainage washes thereon, making considerable portions of said subdivision units undesirable and costly to utilize for residential purposes. (For example, take the aerial photographs, Exhibit 55 Series (which have the sections written on the reverse side) and the corresponding plat in the Exhibit 28 Series and see how there is no adaptation of the plot plan to the terrain).

The only assured source of potable water supply available to purchasers of lots in said Lake Mead City subdivision up to the date of the Indictment was from a windmill operated well located in subdivision unit 7-30-16, from which well lot owners would have to haul water at their own expense and provide storage facilities on their lots at their own expense, said well being a distance of 28 or more miles from some of the said subdivision units, with only jeep trails for access to said units. (Lustiger's interview, RT 366, L 1-11, and see maps, Exhibits 22 and 27).

The said subdivisions are located on odd-numbered sections of land, widely scattered geographically in five

different townships, in which townships the even-numbered sections of land are owned by the Federal Government and subject to use for grazing purposes. (Government's Exhibits 22 and 27).

The mere fact of subdividing of a property, without occupancy by tenants and provision of utilities, adequately maintained streets, shopping and other facilities necessary for growth of a community, none of which has occurred on the said Lake Mead City subdivisions, does not insure or even make probable a rise in land values.

Land values in the said Lake Mead City subdivisions did not increase by 50% as a result of progression of said subdivision activities, during a few months, or at any time since said subdivision took place. Because of the improbability of an orderly residential community ever developing on these widely scattered, inaccessible properties on rough terrain, increases in values of said properties are not assured or even likely and it is improbable that purchasers of 1-1/4 acre lots in said subdivisions will ever be able to subdivide said 1-1/4 acre lots into four smaller parcels and sell each of said smaller parcels for more than they paid Lake Mead Land and Water Co. for said 1-1/4 acre lots.

Any price increases which have occurred since subdivision of the said land have been arbitrarily made by Lake

Mead Land and Water Co. and were not the result of increased community development, occupancy or other activity in said subdivisions.

Thousands of wise investors have not already decided that the special offering of lots in the said Lake Mead City subdivisions represents a worthwhile holding for future profit, except by having been so convinced by the false representations of Lake Mead Land and Water Co. as to the values of said properties and assurance of increased values in the future predicated upon the development of a city or living community, which has not materialized. (To the contrary were Col. Davidson, who based his opinion on the fact that taxes had risen on other land he owned in Mohave County, RT 433, L 14-18; and Betty Russell, who didn't see the land she bought through the mail and traded it for land in the building area when she got there, believed the land had risen in value, RT 557-558 and 563). These were the only two of eleven purchaser witnesses for the defense who had opinions as to value.

"(q) 'Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and the majestic beauty of the Grand Canyon.'" (Page 4 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(r) 'Less than 5 miles from the lake.'" (Page

17 of Government's Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(s) 'Lake Mead City actually begins less than 5 miles from the lake.'" (Page 9 of Government's Exhibits 37d, 37e, 37f).

"(t) 'Lake Mead City begins less than 5 miles from the lake.'" (Page 8 of Government's Exhibits 37a, 37b, 37c).

"(u) 'Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area.'" (Page 9 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(v) 'These estates nest in the center of the West's greatest recreational facilities.'" (Page 16 of Government's Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

"(w) 'Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas.'" (Page 5 of Government's Exhibits 37a, 37b, 37c).

While one or more of said Lake Mead City subdivision units are within approximately five miles by a straight line from the nearest point on Lake Mead, the distance by the only existing road to Pierce Ferry boat landing on Lake Mead, which is the nearest point on the said lake to said Lake Mead City subdivision units, is approximately 15 miles distant from the nearest and approximately 40 miles distant from the farthest of said subdivision units, and most of said subdivision units cannot be traveled to or from in any ordinary motor vehicle because there are only jeep roads or trails thereto. (See Marshall's testimony, RT 392 and 376).

The Lake Mead City subdivision units are not located in the center or heart of the Lake Mead Recreational Area, but, in fact, are located on the far eastern extremity of said recreational area and are considerably more difficult of access than the more visited and developed places in that recreational area which are in the vicinities of the Boulder, Davis and Parker Dams, accessible by hard surfaced roads. (See maps, Government's Exhibits 22 and 27).

Many, and in fact most, of the Lake Mead City subdivision units are not convenient to water sports at Lake Mead because they are from 20 to 40 miles distant from the nearest accessible point on said Lake and most of said subdivision units are not accessible by motor vehicle. (See testimony of

Marshall, RT 392-401, and maps, Exhibits 22 and 27).

"(x) 'County roads have existed in Lake Mead City for several years, and are maintained by the county.'" (Page 8 of Government's Exhibits 37d, 37e, 37f).

"(y) 'County roads have existed in Lake Mead City for several years and are maintained in proper condition at all times.'" (Page 8 of Exhibits 37a, 37b, 37c).

"(z) 'Lake Mead City is easily reached, with access via U.S. Highways and County Roads. An air-field and a boat anchorage are nearby.'" (Page 16 of Government's Exhibits 37a, 37b, 37c).

They do not disclose the pertinent fact that most of the said Lake Mead City subdivision units are not adjacent to said existing county roads and there are only jeep trails by which many of said subdivision units can be reached and no roads or trails at all to some of the said subdivision units. (RT 392-401; see also the Christiansen testimony concerning the plausibility of roads being cut through some of the sections as dedicated, hills too steep for straight roads, etc. - RT 330-335).

"(aa) 'Modern schools, churches and shopping facilities in nearby Kingman, the county seat.'" (Page 5

of Exhibits 37a, 37b, 37c, and 37d, 37e, 37f).

It does not disclose the material fact that Kingman, Arizona, is approximately 60 miles via existing roads from the nearest of said Lake Mead City subdivision units and as much as 75 miles from some of said subdivision units. (This does appear in the second version of the fact sheet - see 39a; the time of issue of this was not established - it was the second version of the fact sheet, however).

"(bb) 'All our properties are within the franchised area of Citizen's Utilities Company, with regard to power and telephone.'" (Page 21 of Exhibits 37d, 37e, 37f).

It fails to disclose and conceals the true and material fact that the nearest existing electric power lines and telephone lines are approximately 23 miles from the nearest and approximately 38 miles from the farthest of said Lake Mead City subdivision units; that Lake Mead Land and Water Co. will not pay the cost of bringing electric power or telephone lines to any of the said subdivision units; and that any lot owner in said subdivision units desiring electricity or telephone service at any of said lots before existence of a community of residents of sufficient size to make extension of said power or telephone lines to said subdivision units at the expense of the utility companies feasible, could obtain electric

power or telephone service only by paying the full cost of extension of said lines to said lot or lots. (RT 392-393).

"(cc) 'IMPORTANT! Plenty of water.'" (Page 21 of Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

It conceals and fails to disclose the material fact that the only assured source of potable water supply available to purchasers of lots in the said Lake Mead City subdivision units up to the return of the Indictment was from a windmill operated well located on subdivision unit 7-30-16, which is a distance of approximately 28 miles from some of said subdivision units; that said lot owners would have to haul their water from said source and provide storage facilities at their lots at their own expense, and that most of the said subdivision units are not accessible by ordinary motor vehicle.

"(dd) 'All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access.'" (Page 32 of Exhibits 37d, 37e, 37f).

"(ee) 'All parcels have been platted and recorded, with road easements laid out to assure you of access.'" (Page 30 of Exhibits 37a, 37b, 37c).

They withhold and do not disclose the material true fact that streets have been provided in only one of the twenty

(20) existing said Lake Mead City subdivision units, and many of said subdivision units are not accessible by ordinary motor vehicle, nor could lots be located if the subdivision units were accessible as no street or lot markers exist within the said subdivision units, consequently the laying out or providing of road easements does not assure lot purchasers of access to their lots as represented.

Paragraph 8 of the Indictment alleged, omitting the formal allegations, that Lustiger represented through photographs in the brochure (Exhibits 37a, 37b, 37c and 37d, 37e, 37f) that "houses already existed on the said Lake Mead City subdivisions and that water for drinking, boating, water-skiing, fishing and swimming sports was abundant on said Lake Mead City subdivisions, by means of photographs and misleading and false statements concerning said photographs appearing in the aforementioned advertising brochures of Lake Mead Land and Water Co. which were mailed to the persons intended to be defrauded, and by means of vicinity maps of the said Lake Mead City subdivisions mailed by Lake Mead Land and Water Co. to said persons intended to be defrauded, well knowing at the time that said photographs and statements concerning said photographs and said vicinity maps would be and were misleading and false when made and published, which said photographs, statements and vicinity maps are described more particularly hereinafter as follows:

"(a) A photograph of a water pond with the caption 'favorite swimming hole' thereunder, on page 25 of said brochures." (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(b) A picture of a house with the caption 'and comfortable ranch house' thereunder, on page 25 of said brochures." (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(c) The statement at the bottom of page 25 of said brochures: 'The above scenes were all photographed within the boundaries of Lake Mead City... a wonderful place to enjoy life.'" (Exhibits 37d, 37e, 37f).

"(d) Six lake scenes appearing on page 29 of said brochures, with the statement thereunder: 'This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City.'" (Exhibits 37a, 37b, 37c and 37d, 37e, 37f).

"(e) Two photographs of water ponds appearing on page 21 of said brochures, on which page appears the declaration in bold print: 'IMPORTANT! Plenty

of water..., ' and the statement on page 24 of said brochures that all pictures on page 21 were actually photographed within the boundaries of Lake Mead City." (Exhibits 37d, 37e, 37f).

"(f) A photograph showing a lake in the background, appearing on page 9 of said brochures, and the statement appearing below said photograph that 'Lake Mead City begins less than 5 miles from the lake.'" (Exhibits 37d, 37e, 37f).

"(g) A vicinity map of the Lake Mead City area showing thereon two wells, three springs and a water pipe line." (Exhibit 38a or 38b).

None of the aforesaid photographs show houses or bodies of water located on any of the Lake Mead City subdivision units or on any property owned by Lake Mead Land and Water Co. or which Lake Mead Land and Water Co. has options or agreements to purchase.

While one or more of the said Lake Mead City subdivision units are within approximately five miles by a straight line from the nearest point on Lake Mead, the distance by the only existing road to Pierce Ferry boat landing on Lake Mead, the nearest point on said lake accessible by motor vehicle, is approximately 15 miles from the nearest and approximately 40 miles from the farthest of said Lake Mead City subdivision

units, and most of said subdivision units are not accessible by ordinary motor vehicle because there are no passable roads thereto.

The only one of the springs or wells shown on the vicinity map depicting the Lake Mead City Area, located on any of the Lake Mead City subdivision units or on any property which Lake Mead Land and Water Co. owns or has options to purchase, is the clearwater well, located in subdivision unit 7-30-16, and neither Lake Mead Land and Water Co. nor any of the persons who purchase lots in the said Lake Mead City subdivisions have any rights to the use of water from the water pipe line or any of the other wells or springs shown on said vicinity map. (Lustiger's interview, RT 365, L 23 to 366, L 11).

The vicinity maps, Exhibits 38, 38b, 38c, which went through three printings, do not point out the sections owned or under option by Lustiger. If the eleven sections from which lots were sold were marked they would not make even a checker-board pattern.

Paragraph 9 of the Indictment alleged:

"9. 'It was a further part of said scheme and artifice to defraud that the defendant would and did represent to the persons intended to be defrauded who purchased lots or parcels in the said

Lake Mead City subdivisions, by means of memorandums attached to plat maps mailed to said persons, that special care had been taken to select for them lots in the choicest areas or choice areas, or near the Pierce Ferry highway, well knowing at the time that the aforesaid representations were false and fraudulent when made."

The aforesaid representations were deceptive and false when made, in that said locations were not choice or the choicest locations available at the time in said Lake Mead City subdivisions, for the reasons that the lots selected were located in subdivision units not accessible by ordinary automobile, and in which streets, street signs, lot stakes or lot identification markers have not been provided; whereas lots in subdivision unit 23-29-17, the only unit in the said Lake Mead City subdivisions in which streets, street signs, lot stakes and lot identification markers have been provided, and which said subdivision unit is adjacent to the Pierce Ferry Road, have not been selected for said purchasers, but have been held in reserve for trading to lot purchasers who complain about the inaccessibility or lack of streets, street signs, lot stakes and lot identification markers in the said subdivision units in which they purchased lots selected for them by Lake Mead Land and Water Co.

(Lustiger's interview, RT 369, L 3-15).

Paragraph 10 of the Indictment alleged, omitting the formal parts, that Lustiger did, "for the purpose of inducing the persons intended to be defrauded to purchase lots or parcels or additional lots or parcels in the said Lake Mead City subdivisions, without delay and without taking time to inspect the property before purchase, represent to said persons by means of price lists, special offering circulars and advertising mailed to said persons that the prices of lots or parcels in the said Lake Mead City subdivisions would be increased soon because of the rapidly increasing values in the area, that there were but few remaining lots in choice areas and unless said persons intended to be defrauded purchased lots or parcels or additional lots or parcels immediately, they would never again be able to purchase property in the said Lake Mead City subdivision at the price at which said properties were then being offered; whereas, in truth and in fact, as the defendant well knew at that time, the aforesaid representations were deceptive and false, in that properties in the said Lake Mead City subdivisions were not rapidly increasing in value and price increases would be and were arbitrarily made by Lake Mead Land and Water Co."

(See Government's Exhibit 40k, and Exhibits 40, 40a, 40b, 40c, 40e, 40i). There were no improvements added up to

the time of the Indictment, nor were all the lots almost sold in the "choice areas" (see Exhibit 26 showing the number of lots available).

Paragraph 11 of the Indictment alleges:

"11. It was a further part of said scheme and artifice to defraud that the defendant would and did, for the purpose of inducing the persons intended to be defrauded to purchase lots or parcels in the said Lake Mead City subdivisions, knowingly and wilfully conceal from said persons intended to be defrauded material facts affecting the present and probable future value of properties in said Lake Mead City subdivisions and the usability of said properties for residential purposes, by withholding from and not clearly revealing in their advertising said material facts, among which are the following:

"(a) The said Lake Mead City subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the Federal Government and subject to use for grazing purposes." (See Exhibit 26 for list of sections owned and optioned by Lustiger listing the eleven (11) from which he sold lots; then

mark these eleven sections on Exhibit 38 and not even a checker-board pattern results).

"(b) Many of the said Lake Mead City subdivision units have rocky hills and unbridged natural drainage washes thereon." (See Marshall's testimony, RT 376-391, and the aerial photographs - Exhibit 55 Series).

"(c) Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle." (See Marshall's testimony, RT 376-401).

"(d) Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash." (See photographs, Exhibits 108, 109, 110, 111, 112, 113, 114 and 115).

The high mountain and deep natural drainage wash referred to in subparagraph (d) are the Grand Wash and Grand Wash Cliffs which are one thousand feet high and not like the one referred to in Appellant's reply brief on page 24 - - that wash was enlarged by a 50 year rain. These cliffs, the Grand Wash Cliffs, run for 28 miles cutting across "Lake Mead City."

"(e) The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38

miles from the nearest existing electric power and telephone lines." (Marshall's testimony, RT 392-393).

"(f) Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon." (Lustiger's interview - RT 364, L 15-19 and 365, L 1-2).

"(g) The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails." (Marshall's testimony, RT 392-393).

"(h) Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West." (Marshall's testimony, RT 394, Lines 8-14).

At oral argument Appellant's attorney stated the brochures were approved by the Arizona Real Estate Commission. They were not. He was served with a cease and desist order by the California Real Estate Commission, but which was not

gone into in detail by the Government. (RT 374).

Further, at oral argument Government's counsel was asked to explain the money-back guarantee on the back of the Exhibit 37 Series. The sales procedure was as follows:

"Q. Getting back to how much land Mr. Lustiger stated was sold and the price, did he say anything about how those that were not paid for in cash were paid?

"A. Yes, in fact, we discussed the method. He said they advertised in newspapers throughout the country and other publications and the people were requested to send their replies to this Post Office Box 13349. Those that did were given a brochure of about thirty pages and other material. In with that other material was a reservation form for people to return if they wanted to make a purchase, with a deposit, I believe it was \$10. And after they returned the reservation form and deposit, they were then sent a plat map which had their lot marked on it and showed the unit and a copy of a contract or the original and some copies to be executed and returned to the company, a vicinity map with their unit marked on it and possibly other items. He said they were requested to make their payments at Post Office Box

13349 in Phoenix and Lake Mead Land & Water Company had a contract with National Land Company located at 236 East Foothill Boulevard in Azusa, California, and National Land Company took care of the payments; they were forwarded on from Phoenix by Mrs. Tincher, Miss Tincher I guess it was, and then handled by National Land Company. He also said National Land Company had a contract with Lake Mead Land & Water to handle all mail for Lake Mead Land & Water.

"Q. Did you ask him who National Land Company was or who owned it"

"A. Yes. He said it was owned by him and his family and he was President of National Land Company."

(RT 362 L 12 - 363 L 16)

If, within thirty days of the buyer's signing the contract, the buyer was not satisfied, the money paid by the buyer to Lustiger would be returned.

Appellant, in his reply brief, places great reliance on the fact sheet. There were two versions of this fact sheet. The first, Exhibit 39, is attached at the end. The second version, Exhibit 39a (which unfortunately has my markings on it since this Xerox copy was taken of my trial copy), does give the distance to Kingman. The time this second one, Exhibit 39a, was used could not be established

(see Exhibit 58, paragraph 16 - - the wording of the stipulation became "from time to time").

But if the brochure was accurate, why was the fact sheet used? The brochure, Exhibit 37 Series, was printed six times (see Exhibit 37 for dates).

Each individual statement alleged in the Indictment in and of itself does not serve as evidence of the scheme to defraud, but it is the effect of all of these as contained in the brochures which was deceptive and misleading.

None of Lustiger's eleven customer witnesses owned land they had purchased through the mail with the exception of Harold F. Sweeney and Thomas Lincoln, who saw the area but not the lot; the rest switched their lots without seeing the originals, or bought the lot at the office in the building area:

(Col. Davidson, RT 436, lines 22-23; the next one, Mrs. Hummel, bought a house from Mrs. Garret Haynes, not a lot through the mail, RT 498, line 21, thru page 499, line 7; the next one, Howard F. Sweeney, saw the area, RT 549, lines 4-8; the next one, in 1964, Betty Russell, went to the Information office, never looked at the land she had purchased, and traded lots, RT 557, line 17, thru RT 559, line 2; nor did Thomas Lincoln look at the lot, only the area,

RT 577, lines 23-25, RT 578, lines 15-16, and RT 579, line 25, to page 580, line 3; Etta Mitchel lived at the Information office and who had originally purchased a lot, never went to see the lot, RT 584, lines 19-24, until a year after she moved to the Information office; Otis McDonald did not get close to his land, RT 610, lines 8-10; the last one, Delmar J. Meyers, purchased in the building area, Section 23, and saw his lot before he purchased it, RT 616, lines 18-20.)¹

The witnesses testifying for the Government were not satisfied:

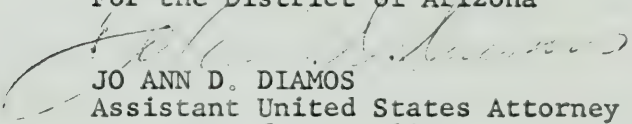
(Mr. Reed, RT 93; Mr. D'Amico, RT 99; Mr. Corley, RT 102; Mr. Bland, RT 109; Mr. Feldman, RT 115; Mr. Rodler, RT 135; Mrs. Bender, RT 150, lines 7-16; Mr. Ball, RT 166; Mr. Bean, RT 191; Mr. Brinkley, RT 185; Mr. Leonard, RT 209; Mr. Oldfield, RT 232-233; Mrs. Johnston, RT 238. Mr. and Mrs. Johnston never purchased land, but received the brochures, etc., tried to get to the land and wouldn't buy after that; Mr. Mecchi, RT 247).

It is respectfully submitted that the evidence taken in

the light most favorable to the Government was sufficient.

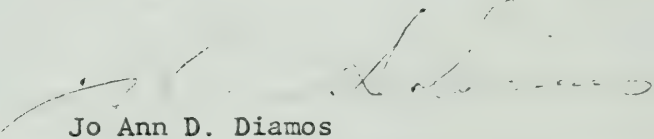
Respectfully submitted,

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United States Attorney
For the District of Arizona



JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the within Supplemental Brief for Appellee on Sufficiency of Evidence mailed this 14th day of July, 1967, to:

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United States Court of Appeals

NINTH CIRCUIT

NO. 20967

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF

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APPELLANT'S SUPPLEMENTAL
AND
REPLY BRIEF

INTRODUCTORY COMMENT

For the reasons hereinafter set forth, counsel believes there are certain statements and representations made in Appellee's Brief which cannot go unchallenged, in that Government counsel has a dual responsibility being both an attorney and a representative of the Government.

In *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, the court made the following comments concerning the duties and responsibilities of a United States Attorney:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every means to bring about a just one." (295 U.S. 78, 88)

In the very recent case of *Giles v. Maryland*, ___ U.S. ___, 17 L. Ed. 2d 737, 744, the Supreme Court stated:

" . . . In *Napue v. Illinois*, *supra*, 360 U.S. at 269, 3 L. Ed. 2d at 1220, we held that a conviction must fall under the Fourteenth Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncorrected when it appears,' even though the testimony may be relevant only to the credibility of a witness . . . "

See also *Miller v. Pate*, ___ U.S. ___, 17 L. Ed. 2d 690.

It is respectfully submitted that opposing counsel has been,

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euphemistically speaking, somewhat less than candid in making disclosures to this Court concerning the evidence procedures in the trial court and, through significant omission of the factors known to her, failed in her duty to this Court to fully and fairly present the case for the Government.

EXAMPLES:

1. On page 9 of Appellee's Brief, first full paragraph, Government's counsel sets forth the items that were sent through the mail by appellant in furtherance of the alleged scheme to defraud. Counsel has omitted in the list of such mailings the "fact sheet" which, indisputably, was also sent by appellant to prospective purchasers (Exhibit 39 Series, RT 96; page 27 of Exhibit 37 Series).

As will be further seen in this Brief, the failure by Government counsel to refer to this "fact sheet" was not inadvertence, since it is in all probability the single most important document introduced in evidence to support appellant's contention that there were no misrepresentations and that he never engaged in a scheme to defraud.

2. On page 11 of Appellee's Brief, it is stated that "The photographs of bodies of water included on page 21 of the brochure (Gov't Ex. 37) were taken not on Lake Mead City property but rather at the Diamond Bar Ranch (RT 255, 56)." This statement again represents a distortion of the facts and evidence on the part of the Government. Nowhere did appellant represent that the Diamond Bar Ranch was owned by him. Rather,

all that was represented was that the Diamond Bar Ranch is within the boundaries of Lake Mead City -- this is a fact. (Ex. 52)

In its Brief, at page 11, the Government also states:

"Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage. (Gov't. Ex. 50, p. 2-3) The Clearwater well is the only source of water controlled (i.e., under option by the Lake Mead Company, RT 298, 361)."

Anyone as familiar with the facts of this case as counsel for the Government must undoubtedly be, knows that Clearwater Well (also named "Lucky Seven Well") was at all times owned by Lake Mead and was never under option. Counsel's references to Reporter's Transcript pages 298 and 361 simply do not support the representation made by the Government to this Court with respect to the water situation on Lake Mead subdivision.

3. On page 42 of the Appellee's Brief it is stated:

"If the deed [referring to the warranty deed] (Government Exhibit 42) [which appellant contends should not have been introduced into evidence] were not offered, then Lustiger would contend the Government was inferring he didn't issue deeds."

Counsel, again, is less than forthright with her presentation of the facts to this Court. The undersigned counsel is informed that in the rebuttal argument made to the trial court (which was never reported) Government counsel stated to the court that appellant knew he was conveying false title, so he "manufactured" a deed that looked like a warranty deed but was in fact a quitclaim deed.

In the first place, it was well known to the Government prior to the trial that, through prior deed transactions on the land before Lake Mead ever acquired title, Lake Mead was having problems in conveying free and clear title to the purchasers and that the matter of the question as to the title that could be passed was then in litigation in the Arizona courts. It was for this reason that the Government stipulated that the question of title was no part of the alleged "scheme to defraud." (See Exhibit 10, paragraph 36)

The second omission which Government counsel failed to state to the trial court and to this Court is that the deed which Lake Mead issued is, to the best information of the undersigned, a copy of the form deed used by title companies in Arizona for conveying property in trust.

Finally, it may be of interest to this Court to know that every purchaser of land in Lake Mead City now has clear and unimpaired title to that land.

4. With respect to appellant's contention of inadequate counsel *at trial*, the Government's response is truly astonishing.

First of all, it is submitted that Government counsel has information in her possession regarding the mental and emotional state of trial counsel which she has refused to reveal or acknowledge, although written demand has been made for her so to do.

Secondly, it is submitted that Government counsel may not be

in a position, either emotionally or by lack of experience, to judge whether Mr. Madden was a competent *criminal defense attorney*. Perhaps the vice in this type of trial is that both the Government counsel and the trial counsel were complete novices in the trial of a criminal mail fraud case.

It is true that Mr. Madden was one of the finest lawyers in the State of Arizona, if not the United States, with respect to land title problems. His preparation for trial was thorough and meticulous and, in every sense of the word, professional.

At that point his professional competence ended. When he entered the criminal trial, he was out of his water. There is little connection between the trial tactics and law of a civil case and that of the criminal case, and competence and knowledge in one area do not necessarily carry over into the other. The comparison does not exist. To say that it does is analagous to the fallacy of proclaiming a certain underarm deodorant to be the best because Albert Einstein used that deodorant and he was a mathematical genius.

Perhaps the finest compliment this counsel could have paid to Mr. John Madden is that for the purposes of the Appellant's Opening Brief, a great deal of Mr. Madden's work was plagiarized, because, for the most part, it was found to be extremely accurate. Apparently Government counsel feels that if a brief contains material which is copied, then it must be erroneous. *Non sequitur*.

GENERAL RULES OF LAW
APPLICABLE TO MAIL FRAUD CASES

It is almost unnecessary to state that a violation of Title 18 U.S.C. Sec. 1341 requires the finding of (1) a scheme to defraud (2) by use of the mails. *Parr v. United States*, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277. While there is some disagreement among the authorities, the better reasoned cases hold that someone must, in fact, be defrauded for a mail fraud violation to be complete. Thus, in *United States v. Brunet*, 227 F. Supp. 766 (W.D. Wisc. 1964) the court stated:

"In *United States v. Rabinowitz*, 6 Cir., 327 F. 2d 62, at page 76, decided January 22, 1964, the court cited the *Baren* case [*United States v. Baren*, 2 Cir., 305 F. 2d 527] and said as follows:

"'This was the Government's case. In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded. * * * The scheme to defraud must have included the intent to do so. Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be found guilty.'

"There are cases which hold that it need not be shown that someone suffered a loss. Indeed, the Standard Instructions in 27 F.R.D., p. 152, §21.09 . . . [so provides].

"However, the court believes that inasmuch as the *Baren* and the *Rabinowitz* cases, *supra*, are so recent, it is inclined to follow them in this and future cases. . . . " (at p. 772)

Thus, if as contended by appellant the land sold by appellant was worth an amount equal to or greater than the price paid by the purchaser, the foregoing cases are authority for the proposition that appellant could not properly be convicted of mail fraud. It should

be noted that several witnesses believed the land purchased by them had substantially risen in value (RT 428, 563, 617).

It should also be noted that even if a purchaser did not get as much value as he was promised, but actually got no less than that for which he paid, there can be no fraud. *Milner v. United States*, 174 Fed. 35 (7th Cir. 1909)

Good faith on the part of the defendant is a complete defense to a mail fraud prosecution. *Gold v. United States*, 36 F. 2d 16 (8th Cir. 1929); *Harris v. United States*, 261 F. 2d 792 (9th Cir. 1958). In addition, if a person is a visionary with respect to his plans and actually believes his plans will succeed, there can be no violation of Section 1341. *United States v. Corlin*, 44 F. Supp. 940 (S.D. Cal. 1942). Also, a promise to refund the purchase price made in good faith negates an intent to defraud. *Harrison v. United States*, 200 Fed. 662 (6th Cir. 1912). It is important to note that the refund offer made in the *Harrison* case is quite similar to the one made by the appellant in the instant case. The Court's attention is also directed to *Gordon v. United States*, 358 F. 2d 112 (5th Cir. 1966) which deals with an analogous problem.

Furthermore, mere "seller's talk" or "puffing" does not subject a person to prosecution for mail fraud. *United States v. Rabinowitz*, 327 F. 2d 62 (6th Cir. 1964) (See discussion, *infra*); *United States v. Staples*, 45 Fed. 195 (D.C.W.D. Mich. 1890). Exaggerations in business advertising do not constitute criminal conduct. *Faulkner v. United*

States, 157 Fed. 840 (5th Cir. 1907).

The courts have also laid down the following rules for appellate courts in reviewing a mail fraud prosecution:

1. Where the evidence is as consistent with innocence as with guilt, the appellate court must reverse the conviction. *Harrison v. United States*, *supra*; *Yusem v. United States*, 8 F. 2d 6 (3rd Cir. 1925); *McClintock v. United States*, 60 F. 2d 839 (10th Cir. 1932).

2. Where guilt depends entirely on circumstantial evidence, proof of guilt must not only be beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence. *Epstein v. United States*, 174 F. 2d 754 (6th Cir. 1949).

3. Fraud is never presumed; rather, it must be proved by clear and satisfactory proof. *St. Clair v. United States*, 23 F. 2d 76 (9th Cir. 1927).

4. Where, as in the instant case, the sufficiency of the evidence is attacked, the appellate court must conduct a meticulous review of the entire record and all exhibits. *United States v. Rabinowitz*, *supra*.

III

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION

For convenience, the indictment can be divided into six different classes of alleged misrepresentations or conduct engaged in pursuant to

the alleged scheme to defraud. Thus, Paragraphs 2 through 6¹, inclusive, of the indictment may be grouped together for the purpose of discussion, and Paragraphs 7, 8, 9, 10 and 11, respectively may be discussed separately.

INDICTMENT, PARAGRAPHS 2-6

Paragraphs 2 through 6, inclusive, essentially charged the appellant with doing the following:

1. Organizing Lake Mead Land & Water Company (hereinafter referred to as "LM") as a corporation, becoming an officer thereof and actively engaging in its business (Paragraph 2).

2. Using Post Office Box 13349, Phoenix, Arizona, as the mailing address for LM (Paragraph 3).

3. Causing LM to enter into contracts to purchase approximately 35,000 acres of unimproved Mojave County land and subdividing some of them (Paragraph 4).

4. Offering for sale to the public parcels within such subdivisions on a deferred-payment plan (Paragraph 5).

5. Entering into contracts with the public for the sale of parcels within such subdivision (Paragraph 6).

¹ All references are to Count I of the indictment, since the remaining counts incorporated by reference the salient allegations of Count I.

It seems clear that none of these statements could conceivably be held to constitute wrongdoing in and of themselves. Only if the alleged fraudulent misrepresentations set forth in the subsequent paragraphs of the indictment were false do the statements in Paragraphs 2 through 6 have any meaning.

INDICTMENT, PARAGRAPH 7

It therefore appears that the alleged false statements contained in Paragraph 7 of the indictment must first be examined. Each alleged false statement contained in Paragraph 7 is discussed below, following a recitation of each such statement.

Paragraph 7, subparagraphs (a), (b), (c), (e), (i), (j), (k), and (q) are as follows:

(a) "Join us for Pleasure and Profit at Lake Mead City, Arizona."

(b) "Lake Mead City an enchanted city in the making, a truly outstanding New Frontier for wise investors."

(c) "Lake Mead City. Arizona's best located planned community."

(e) "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers."

(i) "Seldom, if ever, will you find it possible to purchase so much good land for such a low price."

(j) "You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona."

(k) "The best located resort property in the West."

(q) "Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and

the majestic beauty of the Grand Canyon."

Clearly, all of the foregoing statements represent no more than "seller's talk" or "puffing," which are not made criminal by Section 1341. *United States v. Rabinowitz, supra; United States v. Staples, supra.* The same is true of exaggerations by the seller concerning his product. *Faulkner v. United States, supra.*

If the statements contained in the subparagraphs set forth above (*e.g.*, "Join us for Pleasure and Profit at Lake Mead City, Arizona") are susceptible of being interpreted as fraudulent misrepresentation, then every seller of goods in America who uses the mails to disseminate his advertising is a criminal.

Subparagraph (d), which states "Invest in this booming area now," can be disposed of summarily. This is not even a representation of fact, but a bare suggestion. It is inconceivable that this statement could be held to be a fraudulent misrepresentation².

Subparagraphs (f), (g) and (h) are as follows:

(f) "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."

(g) "When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly."

(h) "When development takes place, such as Lake Mead City, history shows that land values rise rapidly."

² Parenthetically, subparagraph (a) may, in fact, more resemble subparagraph (d) than it does subparagraphs (b), (c), (e), (i), (j), (k) and (q).

If subparagraphs (f), (g) and (h) are not "seller's talk," they come as close as is possible to acquiring that status. In any event, the record does not reflect nor does the Government point to any evidence which refutes the truth of these statements. In fact, with respect to subparagraphs (g) and (h) the Court can take judicial notice of the fact that land values almost always rise when development of raw land occurs.

Although the matter is not extremely free from doubt, it may be that all of the remaining subparagraphs of Paragraph 7 of the indictment could be held to be representations, the falsity of which would expose the appellant to criminal sanctions. It is submitted, however, that a careful review of the record in this case supports appellant's contention that none of the statements were false. The remaining subparagraphs of Paragraph 7 are discussed below.

Subparagraph (1) provides:

"Location more than any other factor determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting with the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned, deeded properties in Lake Mead City. Get yours now!"

Exhibit 58, Stipulation 18, expressly provided that certain portions of the Lake Mead property were within the boundaries of the Lake Mead National Recreation Area. Subparagraph (1) is, therefore, true.

Subparagraph (m) provides:

"Most of the region shown on this map consists of Federal Land, and is not available at any price. This makes the choice privately owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured."

Again, this statement is not false, since most of the region shown on the map furnished by appellant to prospective purchasers was Government-owned land and not available at any price. (Exhibit 24a; Exhibit 23; Stipulation 58, par. 17)

Subparagraph (n) provides:

"Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivisions have progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens."

With respect to this statement, and assuming most of it is not mere puffing, three witnesses presented unrefuted testimony that the land values had increased substantially. Thus, one witness testified that his land value increased over 50% (RT 427-428), one testified the increase exceeded 43% (RT 560, 563), and another testified the increase was almost 80% (RT 617). Counsel for appellant does not recall any testimony introduced by the Government to indicate that the land had not increased in value. As indicated above, if land values did in fact rise, no one was defrauded and there can be no conviction.

United States v. Rabinowitz, *supra*; *Milner v. United States*, 174 Fed. 35 (7th Cir. 1909). In *Milner*, the court stated:

"It will thus be seen that in all these cases there is present, as a central element of the scheme, intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but

out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or false representation, apart from an actual intended deprivation of the person addressed of the money obtained, held to be an offense under the section in question. In other words, in all of these cases the gist of the offense is the actual or intended injury to the person sought to be reached - fraudulently depriving him of something that he already has - and in none of them is the deprivation of the person addressed of only that which he was led to expect, made the basis of the prosecution.

"Suppose that Mattson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what - of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay 20%? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; and if there has been no intention to deprive, there cannot, within the meaning of this section, be an intention to defraud; *for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit or artifice.*" (Emphasis added.) (174 Fed. 35, 39.)

Subparagraph (o) provides:

"Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues."

It is respectfully submitted that the discussion set forth immediately above relative to subparagraph (n) is equally applicable to subparagraph (o).

Subparagraph (p) provides:

"Thousands of wise investors have already decided that our

special offering represents a worthwhile holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property."

The truth of this statement is conceded by the Government, since, on page 8 of its Brief, it is stated that "By March 10, 1962, approximately 3,000 lots had been sold with 200 having been paid for in full." This statement is also supported by the record. (RT 361, Exhibit 44)

Subparagraphs (r), (s) and (t) provide as follows:

(r) "Less than five miles from the Lake."

(s) "Lake Mead City actually begins less than five miles from the Lake."

(t) "Lake Mead City begins less than five miles from the Lake."

These subparagraphs do not state that all property owned by Lake Mead City was located less than five miles from Lake Mead, but that property begins less than five miles from the lake. Since some of the property was, in fact, located within five miles of the lake, these statements are in no way false. In fact, it was stipulated that, on a straight line basis, the closest of Lake Mead City subdivision units to the nearest place on Lake Mead, accessible by presently existing roads, was approximately four miles, and the farthest was approximately seventeen miles. (Exhibit 58, Stipulation 22)

Subparagraph (u) provides:

"Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area."

The fact that some of the property owned by Lake Mead City was located

within the recreational area and all of the property was located very near the recreational area serves to illustrate the fact that this statement was not false. Additionally, the Government's own witness conceded that the Lake Mead City property was located in beautiful country (RT 407).

Subparagraphs (v) and (w) provide as follows:

(v) "These estates nest in the center of the West's greatest recreational facilities.

(w) "Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas."

It seems clear that both of these subparagraphs are mere "puffing."

In any event, the use of the absolute superlative in subparagraph (v) was certainly qualified by use of the phrase "one of the West's largest" in subparagraph (w).

Subparagraphs (x), (y), (z) and (aa) provide as follows:

(x) "County roads have existed in Lake Mead City for several years, and are maintained by the county."

(y) "County roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times."

(z) "Lake Mead City is easily reached, with access via U. S. Highways and County Roads. An airfield and a boat anchorage are nearby."

(aa) "Modern schools, churches and shopping facilities in nearby Kingman, the county seat, and the largest city in northwest Arizona."

None of the foregoing four subparagraphs contain false statements. The evidence showed that the sections of land owned by Lake Mead City are located roughly sixty miles from rapidly expanding Kingman, Arizona

(RT 458-459). Further, the property owned by Lake Mead could be reached by utilizing any one of three routes: Highway 93 and the Pierce Ferry Highway; the Hilltop route; and the Hackberry route. (RT 393-395; 444-445; 286-288). All of these roads were county-maintained, and since 1958, with the advent of subdivision activity in the area at Lake Mojave Ranchos (RT 448-449; 289-291), Meadview (RT 296-297; 454-455) and at Lake Mead City (RT 294-295), the roads were gradually improved (RT 439-447). In addition to these county-maintained roads, there were numerous ranch roads in these sections (RT 443; 260-261).

Subparagraph (bb) provides:

"All our properties are within the franchised area of Citizens Utilities Company, with regard to power and telephone."

Appellant's counsel is unable to find any reference in the record which would tend to indicate that the statement contained in this subparagraph is, in fact, false.

Subparagraph (cc) provides:

"IMPORTANT! Plenty of water."

In its Brief, at page 11, the Government states:

"Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage.
. . ."

Nowhere in Lake Mead's brochure was it represented that the subdivision had piped-in water. All the brochure said was that water was plentiful, and this was, in fact, true. Exhibit 58, Stipulations 24, 25 and 26

(see also RT 298) clearly demonstrate that water was available for the Lake Mead subdivision. Furthermore, according to the statement contained in the Government's Brief, Clearwater (or "Lucky Seven") Well was under option. (This statement in the Government's Brief is incorrect. Counsel is informed that this well was at all times owned by appellant and that another well had been dug by Lake Mead prior to indictment and a third was under option - all of which was known to the Government.) Exhibit 38a clearly shows that the Clearwater Well is located on Lake Mead's property. The appellee also fails to indicate that the obtaining of water by having it delivered in a tank truck is, rather than being unusual, the most common method of obtaining water in the Arizona desert areas.

Subparagraphs (dd) and (ee) provide:

(dd) "All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access."

(ee) "All parcels have been platted and recorded, with road easements laid out to assure you of access."

With respect to subparagraph (dd), there is no question that this statement is absolutely precisely correct. All units had been properly surveyed and subdivided and recorded - all in accordance with the Arizona Department of Real Estate and had been approved by them. They were recorded with the Mojave County Recorder (Ex. 26, Ex. 28, Ex. 58, Stipulation 14; RT 370). The word "plat" simply means: "A map, or representation on paper, of a piece of land subdivided into lots, with streets, alleys, etc.; usually drawn to a scale." (Black's Law Dictionary, 4th Edition)

The statement that "all road easements are provided to assure you of access" is also a true statement, since easements were provided although the roads may not yet have been physically placed on the land. The representation was that all parcels had access by way of platted recorded maps. This is confirmed by the statement which is part of subparagraph (ee), "All parcels have been platted and recorded, with road easements laid out to assure you of access."

INDICTMENT, PARAGRAPH 8

Appellant is also charged with misrepresentations as set forth in Paragraph 8 of the indictment. A thorough review of the record indicates that no misrepresentations were made with respect to the statement set forth in Paragraph 8. The individual subparagraphs of Paragraph 8 are discussed in the following paragraphs.

Paragraph (a) concerns a representation made in one of appellant's brochures to the effect that the picture contained on page 25 of the brochure was "a photograph of a water pond with the caption 'favorite swimming hole' thereunder." Assuming that such statement could even be the subject of a fraudulent misrepresentation, Exhibit 52 indicates that the company's independent engineer stated that the picture on the top of page 25 "was taken by Mr. Miller and again is a picture of the watering tank at the Diamond Bar Ranch, a watering tank which the ranch foreman's children, to my knowledge, used for swimming." Contrary to the statements contained in the Government's Brief, witness Christianson testified that his children had been in the swimming pool on no less

than six occasions. (RT 290-291)

Subparagraph (b) charges misrepresentation with respect to "a picture of a house with the caption 'and comfortable ranch house' thereunder, on page 25 of said brochures." The statement made in appellant's brochure was that a comfortable ranch house existed on Lake Mead's subdivision. In Exhibit 52, the company's independent engineer again corroborates the fact that such a ranch house existed. How or in what manner this is misleading is not indicated by the Government, and the answer is not known to counsel for appellant.

Subparagraph (c) charges misrepresentation in stating that all of the scenes in the brochures "were . . . photographed within the boundaries of Lake Mead City...a wonderful place to enjoy life." Again, the statement by the company's independent engineer, contained in Exhibit 52, seems to indicate that this statement is true.

Subparagraph (d) incorporates a statement from page 29 of appellant's brochure: "This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City." The same statement applicable to subparagraph (c) is applicable to this subparagraph.

Subparagraph (e) contains the alleged misrepresentation:

"IMPORTANT! Plenty of water . . ." As indicated above, water was plentiful on the Lake Mead subdivision, and all of the photographs were taken within the boundaries of Lake Mead City. This paragraph, then, forms no basis for an allegation of misrepresentation.

Subparagraph (f) asserts misrepresentation in stating that "Lake Mead City begins less than five miles from the lake." Exhibit 58, Stipulation 22, clearly indicates that certain portions of the Lake Mead subdivision were located approximately four miles from Lake Mead itself.

Subparagraph (g) apparently charges misrepresentation by providing each prospective customer with a vicinity map on which was shown two wells, three springs and a water pipe line. Since each of these items was physically present on the Lake Mead subdivision, it is difficult to understand how or in what manner the map constituted a misrepresentation.

INDICTMENT, PARAGRAPH 9

Very little comment is required with respect to Paragraph 9. Basically, the allegation is that the appellant did not take special care to select choice lots in the area. Yet, the record reflects that such was not the case. This is corroborated by the fact that Exhibit M indicates that as of August 31, 1963, Lake Mead City had expended \$36,552.61 for engineering and development and \$263,689.42 for land acquisition.

INDICTMENT, PARAGRAPH 10

Paragraph 10 basically contains allegations that appellant represented that the land values were increasing, whereas, in fact, they were not. Since this issue has been treated in previous portions of this Brief, no further discussion will be undertaken at this time.

INDICTMENT, PARAGRAPH 11

Paragraph 11 of the indictment charges the appellant with "withholding from and not clearly revealing in their advertising" certain material facts. The phrase "not clearly revealing" is very vague and imparts to the appellant no particular information with respect to the extent to which his conduct was wrongful. Despite this fact, appellant will attempt, in the following paragraphs, to demonstrate that each of the subparagraphs contained in Paragraph 11 contain truthful statements.

Subparagraph (a) provides:

"The said Lake Mead subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes."

The answer to these allegations is that in the fact sheet forwarded by appellant to all prospective purchasers (see p. 27 of the Exhibit 37 series), appellant clearly stated that "Most of the land in this area is owned by the United States Government, and is not for sale, at any price." Further, it is submitted that the Government failed to prove either that revelation of the fact that the Lake Mead City subdivision units were all located on odd-numbered sections of the land was necessary

or that the fact that property is located on odd-numbered sections of land is any impediment to the development of such land.

Subparagraph (b) provides:

"Many of the said Lake Mead City subdivision units have rocky hills and unbridged natural drainage washes thereon.

It is submitted that all of the evidence produced by the Government concerning the mountainous nature of certain portions of Lake Mead City subdivisions (RT 273, 311, 348, 349, 356, 357, 379; Exhibit 60, 60A, 60B) is meaningless when it is remembered that one of the areas of prime concern for the Government (Unit 17-28-60) was set aside as a game refuge (Exhibit 26). Similarly, the Government's evidence about the "big wash" in Unit 7-30-60 (RT 262, 263, 383) was also rendered nugatory, insofar as affording any predicate for a fraud charge is concerned, when it is remembered that the 50-year rain (RT 332) which had so transformed this section (RT 309, 310, 311) occurred in the fall of 1962 (RT 405, 406), not in 1961 (RT 307, 308). By that time, Lake Mead had long ceased selling parcels (RT 367) and, no more than its engineers or any Tucson subdivider, could it be charged with fraud for having failed to anticipate a 50-year rain. Additionally, while the Government proved that parcels were sold from this unit, they failed to prove the sale of a single parcel in the "big wash area." The same can be said about all of the Government's testimony about washes and terrains in other subdivision units (RT 380-383, 385-392); in no instance did the Government prove that Lake Mead sold any parcel within the specific area that was described. The engineering evidence that the terrain, as disclosed by field inspections, governed the various parcel sizes (Exhibit 52, 53;

see also Exhibit 26) remained uncontradicted.

Subparagraph (c) charged fraud in that appellant did not clearly reveal that "Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle."

Again, reference must be made to page 27 of the Exhibit 37 series, which states that the subdivision has "no streets or utilities . . . available." Further, as was indicated in the discussion of subparagraphs (x) and (y) of Paragraph 7, *supra*, roads were available to the Lake Mead subdivision.

Subparagraph (d) provides that:

"Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash."

The discussion hereinabove set forth under subparagraph (b) of this paragraph is applicable to the within subparagraph.

Subparagraph (e) provides:

"The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles from the nearest existing electric power and telephone lines."

Again, reference must be made to the fact sheet (Ex. 37), which clearly states that the subdivision was without present city conveniences and that no utilities are available. The fact sheet also clearly states that butane or bottled gas is generally used throughout the area.

Subparagraph (f) provides:

"Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon."

The fact sheet (Exhibit 37) contains revelations with respect to this matter, since the fact sheet clearly states that no streets were available. Further, the discussion hereinabove set forth with respect to subparagraphs (dd) and (ee) of Paragraph 7 of the indictment are applicable here.

Subparagraph (g) provides:

"The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails."

This allegation seems to be refuted by the language of Stipulation 22, Exhibit 58, which provides:

"That now and at the times charged in the Indictment, on a straight line, the closest of said Lake Mead City subdivision units, to the nearest place on Lake Mead accessible by presently existing roads was approximately four miles and the farthest approximately seventeen miles."

Of the 20 sections which Lake Mead subdivided, six were accessible by ordinary passenger car, and of the rest all but five were accessible by pick-up, scout or jeep (RT 376-378; 277-279).

Subparagraph (h) provides:

"Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West."

Again, the Government assumes that by the representation that water was

available, appellant was stating that piped-in water was available. As was indicated above, water was plentiful on the Lake Mead subdivision and was available in the manner in which water is usually obtained in desert area lands in Arizona, to wit, delivery by tank truck, from water obtained from the wells on the property owned by Lake Mead City.

IV

THE GOVERNMENT HAS FAILED TO PRESENT TO THE COURT IMPORTANT FACTS BEARING ON THIS CASE

In the introductory portion of this Brief, counsel for appellant set forth certain flagrant factual omissions by the Government. In addition to these omissions, appellant respectfully desires to bring to the attention of the Court certain other similar items.

While it is true that one of the Government witnesses testified that the appellant paid an average of \$40.00 an acre for the property owned by Lake Mead City, this statement must be considered in light of Exhibit 58, Stipulation 19, which provided that the purchase price of the land ranged from a low of \$33.20 per acre to a high of \$125.00 per acre.

On page 10 of the Government's Brief, it is stated that the facts were far different from the representations made by the appellant, in that the appellant "subsequently admitted that its land was totally undeveloped and 'was not suitable in its present state for home building'."

The Government fails to point out to the Court that the initial fact sheet (Exhibit 37 series) sent to all prospective purchasers clearly indicated that the property was without present city conveniences, had no streets or utilities, and that the subdivision was a "brand new project." Other statements contained in the fact sheet indicate that Lake Mead at no time was represented as a fully developed project.

On page 11 of its Brief, the Government apparently is contending that there were misrepresentations made with respect to the proximity of Kingman, Arizona. Yet, again, the fact sheet clearly states (p. 27 of the Exhibit 37 series) that Kingman is "a short 60 miles away."

On page 16 of the appellee's Brief, it is asserted by the Government (which assertion cannot be supported by the record, since there is apparently no record of the proceedings) that appellant's counsel conceded that there was no delay in the mail. Although present counsel for appellant was not present at this proceeding, he is informed that no such concession was ever made.

On page 30 of its Brief, the Government states that the "'refund letter' of appellant was not an unqualified offer of refund and was not made until after Lustiger was interviewed by Postal Inspector Doyle Marshall, to wit, November 10, 1962." This is another instance where counsel for the Government is in possession of facts which she is suppressing. As counsel for the Government is fully aware, the "refund letter" was in the form prepared by appellant's attorney after consultation with Carl Muecke, who was at the time of the instant

prosecution the United States Attorney for the District of Arizona.

On page 44 of its Brief, the Government states that John S. Schaper, who was the partner of appellant's trial counsel, did not have the trial experience of plaintiff's trial counsel. It is appellant's counsel's information, which information certainly must be available to counsel for the Government, that Mr. Schaper is an ex-prosecutor who has a substantial amount of criminal trial experience. Further, it is the information of appellant's present counsel, which information is also at the disposal of counsel for the Government, that Jack Madden, appellant's trial counsel, had never before tried a federal criminal case nor any felony case, jury or otherwise.

V

Appellant will not burden the Court with an exhaustive repetition of the errors previously asserted by appellant. Appellant desires, however, to bring to the attention of the Court several other cases in support of propositions originally raised in Appellant's Opening Brief.

With respect to appellant's contention that the trial court erred in failing to order an inspection of the Grand Jury minutes (V, Paragraph A, of Appellant's Opening Brief), appellant respectfully desires to incorporate herein by reference the entire argument presented by appellant to the trial court, which argument is set forth in the Transcript of Record, pages 30-35, inclusive. Appellant also desires to cite to the Court *Dennis v. United States*,

384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973, wherein the court reversed a conviction and remanded the matter for a new trial because of the refusal of the trial court to allow inspection of the Grand Jury minutes.

With respect to appellant's argument that the trial court erred in denying appellant's Motion for a Bill of Particulars (Appellant's Opening Brief, V, B), the Court's attention is respectfully directed to *United States v. Greve*, 12 F. Supp. 372 (E.D. N.Y. 1934); *United States v. Garrison*, 168 F. Supp. 622 (E.D. Wisc. 1958); *United States v. Hughes*, 195 F. Supp. 795 (S.D. N.Y. 1961).

As is indicated in VIII, Paragraph B, Appellant's Opening Brief, it is appellant's contention that the court erred in refusing to permit the appellant to introduce evidence concerning the practices of other subdivisions in the Mojave County area. In addition to *United States v. Brandt*, 196 F. 2d 653 (2d Cir. 1952), which appellant contends is squarely in point and clearly indicates that the trial court ruled erroneously on this issue, appellant desires to bring to the attention of the Court the following authorities: *Worthington v. United States*, 64 F. 2d 936 (7th Cir. 1933); *Hartzel v. United States*, 72 F. 2d 569 (8th Cir. 1934); *United States v. Shavin*, 287 F. 2d 647 (7th Cir. 1961); and *Kleeden v. United States*, 45 F. 2d 87 (5th Cir. 1930).

It is submitted that the evidence of other projects in the area is clearly relevant to the issues of the case. If the appellant's activities were no different from those engaged in by other subdivisions

in the area, such a fact would constitute strong evidence of good faith on the part of the appellant. Where, as here, intent is an essential element of the crime, the defendant should be and is permitted to prove any fact which throws light on his intention.

Norcott v. United States, 65 F. 2d 913 (7th Cir. 1933).

Again, and in order not to burden the Court with additional reading material in this case, with respect to appellant's contention that the court below erred in ruling on numerous items of evidence presented to it, appellant hereby respectfully requests the Court's permission to incorporate by reference the claims of error and arguments set forth in the Motion for New Trial made on behalf of appellant, particularly Transcript of Record, pages 289 through 302, inclusive.

Respectfully submitted,

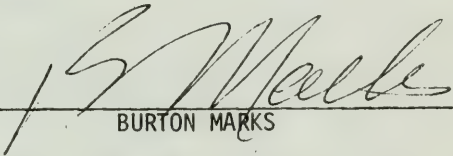
MARKS & SCHNEIDER

BY BURTON MARKS

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of The United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


BURTON MARKS

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

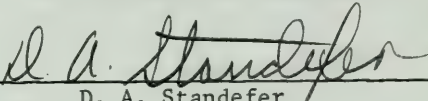
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on June 24th 1967, I served the within APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF (Lustiger v. United States - No. 20967) on the following named party, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

U. S. Attorney's Office
Miss Jo Ann Diamos
Assistant U. S. Attorney
412 Post Office & Federal Building
Tucson, Arizona

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24th, 1967, at Los Angeles, California.


D. A. Standefer

Orig & 20 cys: United States Court of Appeals
For the Ninth Circuit
U. S. Post Office and Courthouse Bldg.
7th & Mission Sts.
San Francisco, California 94101

SUBSCRIBED AND SWORN TO BEFORE ME
THIS DAY OF JUNE, 1967.

NOTARY PUBLIC IN AND FOR
THE COUNTY OF LOS ANGELES

DEAN-STANDEFER MULTI COPY SERVICE, 215 W. Fifth Street,
Los Angeles, Calif. 90013 - MADison 8-6898

No. 20991 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET CENTER,
INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JAMES, as Joint Venturers or Copartners, and JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JAMES, individually,

Appellees.

APPELLANTS' OPENING BRIEF.

FILED

SEP 23 1966

JOHN P. STODD,

8447 Wilshire Boulevard,
Beverly Hills, California,

Attorney for Appellants.

WM. B. LUCK, CLERK

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Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final judgment made and entered in the United States District Court for the Southern District of California, and it is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure in the United States District Court.

On August 26, 1964, Joseph J. Franklin *et al.*, the Debtors and Appellees herein, filed their Petition and

schedules in the U.S. District Court under Chapter XI of the Bankruptcy Act.

On September 8, 1964, the Debtors filed with Robert B. Powell, Referee in Bankruptcy, an Application to Stay State Court Action [Clk. Tr. p. 2].

On September 8, 1964, Robert B. Powell, Referee in Bankruptcy, issued an Order to Show Cause thereon with Temporary Restraining Order [Clk. Tr. p. 12].

On September 15, 1964 Marvin B. Kapelus and Crenshaw Carpet Center, Inc., Appellants, filed their Answer to the Debtors' Application for Order to Show Cause [Clk. Tr. p. 14].

On October 5, 1964 Robert B. Powell, Referee in Bankruptcy, issued an Order restraining Appellants from proceeding with their Cross-Complaint in the state court action until further Order of the Bankruptcy Court [Clk. Tr. p. 20].

On October 30, 1964 Marvin B. Kapelus and Crenshaw Carpet Center, Inc. filed their Application for Reconsideration and to Vacate the Order of October 5, 1964 [Clk. Tr. p. 36].

On October 30, 1964 Robert B. Powell, Referee in Bankruptcy, issued an Order to Show Cause thereon [Clk. Tr. p. 22].

On November 14, 1964 the Debtors filed their Answer to Appellants' Application for Reconsideration and to Vacate the Order of October 5, 1964 [Clk. Tr. p. 31].

On November 3, 1964 the Debtors filed their Application to Quiet Title to Real Property and in the Alternative to Set Aside Fraudulent Transfer [Clk. Tr. p. 40].

On November 3, 1964 Robert B. Powell, Referee in Bankruptcy, issued an Order to Show Cause thereon [Clk. Tr. p. 57].

On November 17, 1964 Marvin B. Kapelus and Crenshaw Carpet Center, Inc. filed their Response to the said Application and Order to Show Cause and Objection to Summary Jurisdiction of the Bankruptcy Court [Clk. Tr. p. 59].

Between the dates of December 10, 1964 and January 18, 1965, before Herschel E. Champlin, Referee in Bankruptcy, a joint trial was held on the Appellants' Application for Reconsideration and to Vacate Restraining Order and on the Debtors' Application to Quiet Title to Real Property and in the Alternative to Set Aside Fraudulent Transfer.

On March 2, 1965 the Debtors filed their Application and Notice to Tax Costs in Favor of Debtors [Clk. Tr. p. 24].

On March 29, 1965 Herschel B. Champlin, Referee in Bankruptcy, filed his Findings of Fact and Conclusions of Law, which were dated March 12, 1965 [Clk. Tr. p. 89].

On March 29, 1965 Herschel B. Champlin, Referee in Bankruptcy, filed his Order Decreeing Deed to be a Mortgage, and Taxing Costs Against Appellants, which Order was dated March 12, 1965 [Clk. Tr. p. 121].

On February 28, 1966 Herschel B. Champlin, Referee in Bankruptcy, entered his Order Nunc Pro Tunc correcting the Order of March 12, 1965 [Clk. Tr. p. 145].

On April 9, 1965 Appellants filed their Petition for Review from the Referee's Order of March 29, 1965 [Clk. Tr. p. 130].

On August 9, 1965 Herschel B. Champlin, Referee in Bankruptcy, filed his Certificate on Review of Order of March 12, 1965, along with a Supplemental Certificate on Review by Robert B. Powell, Referee in Bankruptcy [Clk. Tr. pp. 136, 143].

On February 21, 1966 a hearing was held before the Honorable Charles H. Carr, Judge on the United States Court for the Southern District of California, on the basis of the record and Points and Authorities submitted by both sides.

On March 2, 1966 the Honorable Charles H. Carr entered his Order denying Appellants' Petition for Review and also denying the Appellees' Cross-Petition for Review and affirming the Referee's Orders of March 12, 1965 and April 15, 1965 [Clk. Tr. p. 151].

On March 21, 1966 the Appellants, Crenshaw Carpet Center, Inc. and Marvin B. Kapelus filed their Notice of Appeal to this Court [Clk. Tr. p. 154].

Statement of the Case.

Appellant, Crenshaw Carpet Center, in 1962, sold carpet to the Appellee Debtor, Franklin. Said Debtor thereafter failed to pay the indebtedness as agreed, and Crenshaw, through its attorney, Appellant Kapelus, obtained a judgment in the sum of \$9,461.81 and proceeded to enforce collection by legal means [Rep. Tr. Vol. I, pp. 87-91]. Thereafter, through a series of transactions with Franklin, Crenshaw Carpet and Kapelus took title, by foreclosing a second trust deed, to an apartment building in the County of Orange, which the Debtors claim had been owned by them, although the title thereto had been in one Curtis W. Reedy [Rep. Tr. Vol. I, p. 102, to Vol. II, p. 155].

Franklin, being desirous of obtaining, or regaining, title to said apartment building, at first offered to exchange therefor second trust deeds on certain property also in the County of Orange. Crenshaw and Kapelus refused this exchange, declining to accept any further trust deeds from the Debtor. Whereupon, in September, 1964, at Franklin's request, the said Reedy entered into an escrow with Crenshaw and Kapelus whereby the latter parties conveyed their title in the aforesaid apartment building to Reedy, and Reedy conveyed to Crenshaw and Kapelus his title to certain unimproved real property, which is the subject of these proceedings [Rep. Tr. Vol. II, p. 242, to Vol. III, p. 335].

As a condition of the exchange, Crenshaw and Kapelus granted to the said Reedy a written option to purchase back the unimproved property for the sum of \$20,500.00 on or before a date in January, 1964, under specific terms and conditions (Debtors' 33). Said exchange of properties was handled through a formal escrow and a policy of title insurance on the unimproved real property was issued to Crenshaw and Kapelus by a title company [Rep. Tr. Vol. X, p. 1155, to p. 1160]. At the request of the title company, the transferor, Reedy, executed a document guaranteeing the transfer to Crenshaw and Kapelus as an absolute conveyance and as an absolute transfer of title and possession to Crenshaw and Kapelus [Resp. Ex. 2].

Testimony has been submitted by the Debtors, and the Referee has found as a fact, that at the time of the transfer, this property was actually the property of the Debtors herein, and that the transferror and previous record owner, Reedy, was holding title only for the benefit of the Debtors [Find. 29, Clk. Tr. p. 89].

The Debtor, Franklin, has further testified that Reedy transferred title to Crenshaw and Kapelus at his request and the document guaranteeing this as a complete transfer of title and possession was executed by the said Reedy at the request and instruction of the Debtor Franklin [Rep. Tr. Vol. IV, p. 426, lines 13-22].

Reedy and/or the Debtor Franklin attempted to exercise the option of January 21, 1964. Crenshaw and Kapelus refused to accept, alleging various breaches of the terms of the said option [Rep. Tr. Vol. XI, pp. 613-626 and pp. 650-670].

The property involved has at all times remained vacant unimproved land, and the record title to the property has remained in Crenshaw and Kapelus since October 10, 1963, when conveyed to them by Reedy [Resp. Ex. 1 and Rep. Tr. Vol. I, p. 15, lines 13-18; p. 21, line 26, to p. 22, line 11].

On or about January 24, 1964, Reedy and the Debtors herein filed an action in the Superior Court of the State of California in and for the County of Orange against Crenshaw Carpet Center, Inc. and Marvin B. Kapelus, asking that the deed to Crenshaw and Kapelus be adjudged a mortgage and to quiet title to the property in the plaintiffs [Vol. IV, pp. 449, 450].

Crenshaw and Kapelus filed their Answer and Cross-Complaint for Declaratory Relief to quiet title in the said state court action [Rep. Tr. Vol. XII, p. 1491].

A Pre-Trial conference was held in said state court action in July, 1964, at which time the matter was set for trial on October 6, 1964 [Pre-Trial Conf. Order. Clk. Tr. p. 14].

On August 26, 1964, the Debtors filed their Petition under Chapter XI of the Bankruptcy Act, and in

their schedules alleged that they are the owners of the subject real property.

Pleadings were thereafter filed with the Referee in Bankruptcy and hearings held as set forth above. The combined litigation on the Orders to Show Cause [Clk. Tr. pp. 36 and 40] commenced on December 10, 1964 before Referee Herschel E. Champlin, and on January 13, 1965 after thirteen days of litigation, the Referee ruled that he had summary jurisdiction to hear the matters before him [Rep. Tr. Vol. XIV, pp. 1678-1695].

On January 18, 1965, at the next following hearing, the Referee made his oral decision on the case in chief in favor of the Debtors, apparently to the effect that the deed involved held by Appellants was actually a mortgage [Rep. Tr., Vol. XV, p. 1833, line 19, to p. 1838, line 3].

Specification of Errors.

1. The Referee erred in his procedure to determine summary jurisdiction over the matter before him.
2. The Referee erred in assuming summary jurisdiction over the Debtors and their property.
3. The Referee erred in continuing to restrain the pending State Court action between the same parties.
4. The Referee abused his discretion in assuming jurisdiction over the litigation of title to the real property involved.
5. There was insufficient evidence to support the Referee's decision on the merits.
6. On principles of equity, the Appellees were not entitled to relief from the Bankruptcy Court.

ARGUMENT.

It should first be considered that this case is not as complex as the length of the Reporter's Transcript, the record and the list of exhibits might indicate. In essence, it consists of an action filed by a Debtor before a Bankruptcy Referee to recover title to real property previously deeded to Respondents, under a theory that the deed was intended to be a mortgage.

But even before this, it is Appellants' primary contention that the Referee was totally without power to even try the issues over the objections of Appellants.

Should this Court agree with Appellants on this limited issue, then, of course, the volumes of testimony, rulings, exhibits and arguments are for the most part meaningless.

POINT ONE.

The Bankruptcy Court Did Not Have Summary Jurisdiction to Determine the Interest of the Record Owners of the Property.

A. Procedure When Objection Is Raised to Bankruptcy Referee's Summary Jurisdiction.

In all cases where the summary power of the bankruptcy court is disputed, a preliminary inquiry is required to ascertain whether or not the prerequisites of summary jurisdiction are present before the Court can proceed on the merits.

Collier on Bankruptcy, 14th Ed., Vol. 2, Sec. 23.07, pp. 519-620;

In re Gill, 190 Fed. 726, 26 A.B.R. 883 (8th C.C.A. 1911).

The record reflects that on the first day of trial, the attorney for Appellants attempted to acquaint the Referee with his viewpoints and authorities on this limited issue [Rep. Tr. Vol. I, pp. 8, 74], and also contended it must be determined initially and separately from the case in chief.

On the morning of the second day of trial, written Points and Authorities in this regard were submitted to the Referee and served on the opposing parties [Rep. Tr., Vol. II, p. 132; Clk. Tr. p. 76].

Without accepting any further argument or making any comment thereon, the Referee continued to take evidence on the merits of the entire case, apparently under the belief that this was necessary for his determination of whether or not he had jurisdiction to hear the matter. This viewpoint was stated as follows:

“I don’t see how we can make a dent in this problem of jurisdiction until we hear the whole story. Then I think we can consider the stalk from the leaf and get the primary question decided as well as disposal of the other issues as we go along.” [Rep. Tr. Vol. I, p. 28, lines 18-23].

“We are reserving our rulings on all of this until we hear the case. We are not supposed to rule on jurisdiction until we hear a lot more of what we have heard so far.”

“I am here for the purpose of hearing the whole story.” [Rep. Tr. Vol. I, pp. 33, 34].

“We are going to need to hear the whole case before we can even rule on our preliminary issue of jurisdiction.” [Rep. Tr. Vol. I, p. 73, lines 25, 26].

“We have to hear the entire case first.” [Rep. Tr. Vol. I, p. 75, line 5].

“There is a long sequence of course in the transaction as I view it so far. I don’t know what more is coming but it is just another item in the trying of the lawsuit here.” [Rep. Tr. Vol. II, p. 164, lines 4-7].

“We have already ruled from the first day of trial that we are going to hear the whole case before we felt as though we could even begin to rule on the question of jurisdiction.” [Rep. Tr. Vol. VII, p. 782, lines 13-16].

“. . . we ruled at the very beginning that jurisdiction depends on the hearing of the entire case . . .” [Rep. Tr. Vol. X, p. 1196, lines 2 and 3].

Appellants respectfully invite the Court’s attention to the fact that on several occasions they attempted to learn from the Referee exactly why he deemed it necessary to try this entire matter before he could determine the question of summary jurisdiction. The only logical interpretation of the Referee’s statements and actions is that he believed he would be justified in assuming jurisdiction over this matter if he found some equitable or reversionary interest in the property in the Debtors. This was finally indicated by the Referee in stating his decision on jurisdiction [Rep. Tr. Vol. XIV, pp. 1678-1694].

Appellants strenuously urge that the Referee erred not only in his procedures but in the basis upon which he ultimately determined the issue of jurisdiction.

A Bankruptcy Referee cannot base his jurisdictional power upon his ultimate decision of the case in chief. (*Suhl v. Bumb*, 348 F. 2d 869 (9th C.C.A. 1965).)

B. Requirements for Summary Jurisdiction.

It is undisputed that Appellants are the sole record owners of the real property involved in these proceedings and have been continuously since before the Chapter XI proceedings were filed.

The following authorities are cited for the premise that, under these circumstances alone, there is no summary jurisdiction in the bankruptcy court, when they object thereto and have a substantial adverse claim:

1. *Collier on Bankruptcy*, 14th Ed., Vol. 2, Sec. 23.06, note 4, p. 495.

“Record owner of real property, not (a) party to (the) bankruptcy proceedings, cannot be brought within bankruptcy court’s jurisdiction on a petition of (the) trustee to summarily determine title to property.”

2. *In re Black Bear Products* (D.C. Wash.), 56 F. 2d 243.

Claimant Carpenter had record title to real property and bankrupt was buying under a land sale contract, which was in default. Trustee alleged fraud on the part of Carpenter in attempting to foreclose on the property and brought a petition in bankruptcy court to determine title in bankrupt. In denying jurisdiction, the Court stated:

“Carpenter, being vested with the legal title more than eight months prior to adjudication, and not being a creditor, and therefore not a party to the bankruptcy proceeding, has a right to a full, complete, unabridged procedure and remedy—plenary—in adjudicating her title to the property when it is attacked, and a charge of fraud does not change the procedure.”

3. *Wight v. Street* (9th C.C.A.), 63 F. 2d 80.

The bankrupt had deeded the property to the claimant prior to bankruptcy. The trustee brought a petition in bankruptcy court to set aside the transfer, alleging ownership in the bankrupt. The claimant objected to jurisdiction, but the Referee assumed jurisdiction and held the deed was fraudulent in that the transfer was an attempt to hinder and delay creditors. The District Court affirmed but the Ninth Circuit Court reversed, holding the Referee erred in assuming jurisdiction.

4. *Kaplan v. Guttman*, 217 F. 2d 481 (9th C.C.A.).

The Bankruptcy Court had assumed jurisdiction over a controversy involving real property. In reversing the Referee, the late Judge James Alger Fee, at page 484, stated the law as follows:

“Legal title was in the Kaplan Partnership. Possession follows legal ownership.”

5. *In re Mimms and Parham*, 193 Fed. 276.

The bankrupt, prior to bankruptcy, conveyed by deed certain real property to the Respondent. At the same time the Respondent gave an option to the bankrupt to repurchase the land under certain terms and conditions.

It was further provided that the *bankrupt* was to remain in possession of the land—*which he did*.

Thereafter, the petition in bankruptcy was filed, and the Trustee brought proceedings before the Referee to sell the property, free of liens, alleging that the documents described above constituted a mortgage. The Respondent contested the summary jurisdiction of the bankruptcy court (by demurrer).

In denying jurisdiction the Court stated:

“If the Trustee is not in actual possession, *in the legal sense*, of the estate, and if the (Respondent) asserts an adverse claim to the ownership of the lands and its possession thereof by its tenant, and if that claim is not merely colorable, but is one made in good faith, then, under authorities (citing), it would seem to be clear that the controversy in respect to such claim is one which should not, *and indeed cannot*, be settled in a summary way in this proceeding. On the contrary, the rights of the parties *must be* settled in a plenary suit . . .”
(Emphasis added.)

It is, of course, true that the authorities usually look upon *possession* as the criterion in determining summary jurisdiction, but, as indicated by the authorities cited above, this criterion should only be applicable when dealing with *personal* property or at least with property that is susceptible of actual possession.

But at least it can be stated that actual or constructive possession of the subject property by the Debtors is an absolute necessity for summary jurisdiction in the bankruptcy court, when there is no consent by an adverse claimant with a substantial claim.

The property involved in these proceedings, being uninhabited and unimproved, is not susceptible to actual physical possession. We can, therefore, only consider what rights to possession the respective parties may have had and what acts of possession were legally exercised.

And it is the Debtors who have the burden to establish this possession or the right thereto. (*Maule Industries v. Girtstel*, 232 F. 2d at p. 297).

And this burden includes the task of overcoming the presumption that possession is in the Petitioners:

“In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.” (Sec. 321, Calif. Code of Civil Procedure).

A careful scrutiny of the record in this case reveals no evidence whatsoever to establish possession, or the right thereto in the Debtors. But the undisputed evidence does show that the grantor of the property, Curtis W. Reedy, executed a document wherein he agreed that “upon recordation of said deed through said escrow, possession of said premises will be surrendered to said grantee” [Resp. Ex. 2]; and further that the Debtor, Franklin, authorized and instructed Reedy to execute this document [Rep. Tr. Vol. IV, p. 429, lines 13-22].

The Referee has signed Findings of Fact to the effect that possession of the subject property has at all times remained in the Debtors, even though they never at any time held record title. Such a finding is simply not supported by the evidence.

The only evidence in the record which the Debtors sought to rely upon was certain testimony by J. J. Franklin and the witness Reedy regarding:

1. Using the property for the storage of trash containers.
2. Authorizing the removal and erection of certain signs on the property.
3. Removing trees from the property.
4. Moving dirt on the property.
5. Paying the taxes on the property.
6. Taking prospective lenders over the property.

A careful reading of the testimony in this regard, particularly the cross-examination thereon, reveals that every one of these contentions is false as regards the specific property and period of time involved. The only possible exception being No. 6 above which is of no probative value whatsoever.

With regard to the contentions enumerated, the Court's attention is respectfully invited to the following portions of testimony, bearing in mind that the property was deeded to Appellants on October 10, 1963, and the Chapter XI proceedings were filed August 26, 1964.

1. The trash containers were actually on an adjoining property [Rep. Tr. Vol. V, pp. 559, 560; Vol. VIII, p. 981].
2. The Debtors did not, after the deed to Appellants, assume any control over the property in regard to signs [Rep. Tr. Vol. IV, p. 448; Vol. V, p. 561].

3. Any trees removed from the property were removed prior to the deed to Appellants or were removed by the city, apparently as a nuisance [Rep. Tr. Vol. IV, pp. 393, 394; Vol. VII, p. 808].
4. Any dirt removal from the property was done prior to the deed to Appellants or was later required but *not done* by the Debtors [Rep. Tr. Vol. IV, p. 396; Vol. VII, pp. 807, 808].
5. The Debtors purported payment of taxes on January 22, 1964 was by a check which was not honored for payment [Rep. Tr. Vol. VIII, p. 899].

It is thus apparent that there is not one iota of evidence in these proceedings to establish any sort of possession, constructive or otherwise, in the Debtors in spite of the false and misleading statements by counsel for the Debtors in his opening statement [Rep. Tr. Vol. I, p. 55, line 10, to p. 57, line 17].

But it is also apparent that in actuality the Referee was not mislead in this respect in spite of the Findings of Fact he signed.

He obviously did not apply the question of possession in deciding the issue of summary jurisdiction. After thirteen days of taking evidence from eighteen witnesses and the admission of one hundred and twenty-six documents, he determined that he had jurisdiction on the theory that

“At this time the Court finds that the transaction was nothing more than a security transaction.”
[Rep. Tr. Vol. XIV, p. 1683, lines 18, 19],

and at a later point, the Court stated:

“ . . . we could not conclude otherwise but that it was an unequivocal intent of the parties on both sides that this was to be a security transaction and nothing more.” [Rep. Tr. Vol. XIV, p. 1684, lines 19-22].

It is thus evident that the Court's decision as to summary jurisdiction was based on some sort of equitable ownership in the Debtors, and that the respondents were holding the property “as a constructive trust”. This is reflected in the transcript at pages 1693 and 1694, Vol. XIV. It is significant that nowhere in the Referee's decision from the Bench is there even a hint that he was concerned with possession of the property, actual or otherwise, and when Appellants' attorney moved the Court to strike all evidence *not* concerning title or possession of the property, this motion was promptly denied [Rep. Tr. Vol. XIII, p. 1528].

The Appellants, however, in addition to the presumption that they as record owners are in possession of the property, have shown that they made payments on the trust deed encumbrance on the property [Rep. Tr. Vol. I, p. 16], authorized use of the property by others [Rep. Tr. Vol. I, pp. 16, 17], and attended City Council and Planning Commission Hearings concerning the property [Rep. Tr. Vol. XII, p. 1479].

POINT TWO.

The Bankruptcy Court Erred in Continuing to Restrain the Pending State Court Action Between the Same Parties.

As indicated in the Statement of Facts above, the *Debtors* first initiated an action in the state court to determine title to the subject property. A Cross-Complaint was filed by Appellants, Pre-Trial Proceedings were held, and a trial date set, all before the Debtors filed their Petition with the Bankruptcy Court.

Section 314 of the Bankruptcy Act may grant to the Referee the power to *enjoin or stay* proceedings pending in the state court, but this is not to say the Referee is empowered to stay the proceedings indefinitely so that he may seize jurisdiction over the litigation pending there.

The Referee's power in this regard must necessarily and logically be limited to the restraining of state court actions for whatever *reasonable* period of time may be necessary to protect the Debtors' assets.

There was no such necessity in the present case whatsoever, excepting only perhaps to permit a Receiver to substitute into the State Court action and file whatever additional cause of action he might deem appropriate.

Bankruptcy Act, Chap. XI, Sec. 314.

POINT THREE.

Even if the Referee Legally Had Power to Assume Jurisdiction, He Abused His Discretion in so Doing.

Even if the legal requirements are present, the Bankruptcy Court should refuse to accept summary jurisdiction when there is a more proper forum for trial.

The 16 volumes of testimony in this case, if nothing else, prove that we are dealing here with an important problem concerning title to real property and the California Law applicable thereto. We are not dealing with any specific problem or remedy to be found within the Bankruptcy Act, but with a matter of proper concern to the California Courts. The primary factual issue to be determined in this controversy is the *intent* of the parties when the real property was transferred, and it is grossly unfair to deprive the Petitioners of their right to have this issue tried before a jury, if they should so desire.

As to courtroom facilities, it is not necessary to go outside the record to point out that the trial facilities in this case did not even include a blackboard or bulletin board on which the property involved could be displayed. A great deal of testimony and explanations were necessary to keep the Court acquainted with the boundaries, etc. of the property. No law library was available to the Referee, should it be necessary, and the witness stand had no shelf or counter for use by the numerous witnesses in examining documents when being questioned. Additionally, there was not even a

clerk available to mark, log and control the 129 documents admitted into evidence [Rep. Tr. Vol. I, p. 38; Vol. XI, p. 1397, lines 10-12; Vol. XIV, p. 1679, line 15, to p. 1680, line 4].

The extreme difficulty encountered by the Referee in keeping track of the various documents and the precise litigation before him is evidenced by the fact that on at least one occasion he believed he was simultaneously hearing litigation on another Order to Show Cause which happened to be on the same calendar throughout this trial. To save a lengthy quotation, the Court's attention is respectfully invited to the discussion between counsel and the Referee in Volume IV of the Reporter's Transcript, p. 409, line 6, to p. 410, line 13, and again at page 411, line 19, to p. 414, line 10.

Appellants are naturally reluctant to accuse the Referee in this case of actual abuse of his powers. However, Appellants strongly believe and contend that the Federal Courts have plainly announced their policy in this regard. The following summarized cases are submitted herewith in support thereof:

1. *Kaplan v. Guttman* (cited above).

Judge Fee's statement of the law was as follows:

"Even where the United States Courts have complete jurisdiction, by comity their officers frequently refer controversies to the State Courts, which administer local law, in order to arrive at a solution most compatible with the mores of the community. This was not done here. *Although it might well have been*, no question of abuse of discretion is here considered . . . (Emphasis added.)

2. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

A dispute between the Trustee for the bankrupt railroad and Respondent over title to lands. Trustee held a recorded document indicating title in fee and also had possession of the land by virtue of its tracks, usage, etc. Bankruptcy Court took summary jurisdiction. The Supreme Court said summary jurisdiction could lie, but reversed nevertheless:

“A Court of Bankruptcy has an exclusive and non-delegable *control* over the administration of an estate in its possession. But the *proper exercise* of that control may, where the interests of the estate and the parties will best be served, lead the Bankruptcy Court to consent to submission to State Courts of particular controversies involving unsettled questions of State property law and arising in the course of bankruptcy administration . . . (the) decision with which the Federal Court of Bankruptcy is here faced *calls for interpretation of instruments of conveyance in accordance with Illinois law.*” (and should be decided by Illinois Courts) (Emphasis added).

3. *In re Graceland* (D.C. So. Dist. of Calif., Central Division), 73 Fed. Supp. 158.

Involved a cemetery which had been conveyed by the bankrupt prior to bankruptcy—to the adverse claimants. The Referee had made an order for the Trustee to proceed in the State Court, and when the Trustee nevertheless thereafter sought to obtain summary jurisdic-

tion in the bankruptcy court, the District Judge stated the law:

“The Referee was quite right in his views. Since the *record title* to the real property was in the third parties who were adverse claimants, the matter was one for the determination of the State Court.”

4. *Jackson v. Sports Company of Texas, Inc.* (5th C.C.A.), 278 F. 2d 716.

The bankrupt corporation had owned real property improved with a commercial building. Prior to bankruptcy, the corporation President had deeded the land to himself. *The bankrupt corporation continued in possession of the premises up to and including the date of bankruptcy.* The Trustee brought an action to set aside the transfer and summary jurisdiction was objected to by the Respondent.

The Referee assumed jurisdiction and the District Court affirmed. The Circuit Court reversed, using the following language at page 719:

“We think that whether the deed from the corporation to appellant was fraudulent and void under the complicated facts in the record should be determined by a plenary hearing on the merits. This holding is supported by the authorities cited and several cases decided by this court.”

5. *Martoff v. Elliott* (9th C.C.A.), 326 F. 2d 205.

The bankrupt and his spouse held property as joint tenants, which was rented and occupied by third parties. The Trustee brought action to have the property declared to be community. The spouse objected to summary jurisdiction in the Bankruptcy Court.

The Referee assumed jurisdiction, and on Review the District Court affirmed. On appeal the Circuit Court reversed using the following language at page 208:

“She (the spouse) is entitled to have the *question of title* decided in a plenary suit if her claim is substantial and not merely colorable. We conclude that she is entitled to a plenary suit. Her claim has enough substance that we think a *state court* should make the *determination as to title*.” (Emphasis added.)

6. *Palmer v. Travelers Ins. Co.*, 319 F. 2d p. 298.

“The mere fact that the bankruptcy courts do have summary jurisdiction of the property of the bankrupt, and can act expeditiously in the protection of bankrupts’ estates, and have significant obligations to creditors’ and to bankrupts’ debtors to avoid costly and fruitless litigation which might dissipate the bankrupts’ estate, should not persuade them to accept obligations which are not, in any ultimate sense, their business. The obligation of the bankruptcy court to determine controversies in relation to the estates of bankrupts should reach only to the merits of controversies between adverse parties properly before it, and to matters of *undoubted jurisdiction*. It should not extend to substantial summary determination on the merits of a cause which should actually be resolved in another forum by plenary action.” (Emphasis added.)

POINT FOUR.

Appellants' Adverse Claim to the Property Was Substantial and Not Merely Colorable.

The Referee has signed Findings of Fact to the effect that the claims of Appellants have "no real or substantial merit" [Nos. 58, 59 and 60, Clk. Tr. p. 89]. Although it does not appear the Referee assumed jurisdiction on this basis, it is anticipated that Appellees will contend that such a finding will support summary jurisdiction in the bankruptcy court.

Appellants do not deem it necessary to add to the length of this brief by citing authorities on this point. Suffice it to say that thirteen days of trial is ample to establish that a substantial question of fact and law existed.

POINT FIVE.

Appellant Is Entitled to a Decision on the Merits.

A. The Referee's Decision That the Deed Was a Mortgage Is Not Supported by the Evidence.

For authorities in this regard, we must necessarily look to California law and the most recent leading California case (very similar to the present facts) is *Workman Construction Co. v. Weirick*, 223 Cal. App. 2d 487. At page 492, the court stated:

"It must appear to the Court *beyond all reasonable controversy* that it was the intention of not only one but all of the parties that the deed should be a mortgage."

The evidence in the case before the Court does not support a finding to this effect.

It displays to the contrary a series of transactions whereby the Debtor Franklin conveyed or offered to convey trust deeds to Appellants all of which were in default or promptly went into default. This was culminated by the so-called Lot 8 apartment house foreclosure by Appellants which gave them record title thereto in fee. The evidence is undisputed that thereafter Appellees offered Appellants a trust deed on the property involved in these proceedings in exchange for title to Lot 8 and Appellants flatly refused this offer. The result of these negotiations then was the outright conveyance of the subject property to Appellants in exchange for a deed to the Lot 8 property, the only other condition being the option to Appellees to repurchase the equity in the subject property.

The Appellants then had refused to accept any further trust deeds from Appellees. Appellees had, according to their own testimony, knowingly executed documents of absolute transfer in fee to Appellants and with the further knowledge that a title policy was being issued thereon based upon their own written representations that it was *not* a security transaction.

In the *Workman* case, cited above, at page 492, the Court further points up the law that:

“something more than a reservation of the right to repurchase, or a covenant to reconvey, must be shown in order to convert an absolute deed into a mortgage. There is one fact which is indispensable for this purpose . . . it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or someone in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money.”

In the present case, the Referee has evidently determined that the option agreement [Debt. Ex. 33] constituted a promise by the Debtors to pay Appellants the sum of \$20,500.00. Yet nowhere in the document or in the record is there even a suggestion that there was a promise or agreement to pay such a sum.

The Referee has apparently somehow related this sum to the original judgment indebtedness of the Debtor Franklin to Appellants in the sum of \$19,461.81. But the simple unquestioned fact remains that nowhere in the record is there any evidence that the Debtors promised to pay the larger sum or that the original judgment had by some legal means increased to an obligation of \$20,500.00.

To the contrary, it is apparent that when Appellants took title to the Lot 8 apartment property by foreclosure, they then held an asset sufficient to satisfy the original obligation, which must necessarily terminate at that point.

In addition, of course, there is to be considered the fact that the option agreement for \$20,500.00 did not even run between the Debtors and Appellants. It was granted by Appellants to Curtis W. Reedy who had held the title to the property conveyed to Appellants. Certainly, it cannot be contended that this somehow created an *obligation by Reedy* to Appellants in this sum.

**B. The Option Agreement Was Breached and
Not Exercised Properly.**

The Referee has found as a fact and as a Conclusion of Law that the Debtors complied with the terms of the option agreement and it was *fully* and timely performed.

“courts are strict in holding an optionee to *exact* compliance with the terms of the option”.

(*Hayward Lumber & Investment Co. v. Construction Products*, 117 Cal. App. 2d 221).

The Referee here has chosen to ignore the uncontroverted evidence that the Debtors or optionee did not make the trust deed payments and did not pay the taxes when due as the option specifically provided must be done [Rep. Tr. Vol. VII, p. 898, line 23, to p. 899, line 11].

As to the alleged tender by Reedy and/or the Debtors of the re-purchase price of \$20,500.00, the method thereof was, to say the least, highly unusual. The alleged tender to Appellant Kapelus was not by the optionee Reedy or even by the Debtors but by an employee of the R. Ala Escrow Company [Rep. Tr. Vol. X, pp. 1214, 1215]. Furthermore, the funds were admittedly *trust funds* held by the escrow company [Rep. Tr. Vol. V, p. 547, line 13, to p. 548, line 17]; and the said escrow company thereafter lost its license after an investigation by State authorities [Rep. Tr. Vol. X, p. 1223, lines 6-12].

It is difficult to conceive that a tender of funds under such circumstances can be interpreted as amounting to “exact compliance with the terms of the option”.

C. Appellants Were Prevented From Submitting Evidence on the Case in Chief.

As has been argued previously, the Referee erred in his method of determining summary jurisdiction (Point One A. above). This error was prejudicial to Appellants in that they were thereby effectually prevented from submitting evidence which might otherwise have

swayed the Referee as a trier of fact of the main issues. The trial proceedings were commenced by Appellants on the issue of jurisdiction. They submitted evidence only on title and possession at which point they rested [Rep. Tr. Vol. I, pp. 11-22], under the belief that these were the only pertinent points to be considered on this limited issue. Thereafter the Debtors took over the presentation of evidence and up until the time the Referee made his decision on summary jurisdiction, thirteen trial days later, all of the evidence was submitted by the Debtors and ostensibly only on this limited issue. At the point where the Debtors had rested this issue [Rep. Tr. Vol. XII, p. 1499], the Appellants' counsel was questioned by the Referee as to whether he intended to submit further evidence. But it was impossible for Appellants' counsel to learn from the Referee what factual issues the Referee thought needed to be determined [Rep. Tr. Vol. XII, p. 1501, line 4, to p. 1503, line 25].

It is, of course, true that ordinarily the Court owes no duty to advise counsel of the issues or evidence the Court believes are important or necessary to a case. However, Appellants must contend that under the circumstances here the Referee had erred in his interpretation of the law regarding the issues of summary jurisdiction and Appellants were unable to determine in what direction the Referee had departed.

Hence, the important question before the Court was at that time submitted on only oral argument at the request of the Court [Rep. Tr. Vol. XII, p. 1504, lines 5-10], and decided by him from the bench ten minutes after the close of argument [Vol. XIV, p. 1678].

The Referee's decision *at this point* on summary jurisdiction was obviously based solely on a finding that

the deed was a mortgage [Rep. Tr. Vol. XIV, pp. 1683-1694], and Appellants learned for the first time what factual issues the Referee had been seeking to determine. The confused status of the case at this point may even have caused the Referee to believe the entire case was completed, as is indicated by his statement in Vol. XIV, page 1680, lines 5-13 of the Reporter's Transcript.

But at least it is obvious that some confusion existed in that at this point, on the following day, the *Appellants* were requested to proceed [Rep. Tr. Vol. XV, p. 1712] and only after a bit of discourse were the Debtors persuaded to put on whatever further evidence they had in support of their Application [Rep. Tr. Vol. XV, p. 1718].

Such a misunderstanding is not surprising inasmuch as the Referee had already decided the main issues of the case, and it would obviously be fruitless for Appellants to thereafter present evidence. Certainly we must assume that a Referee is as human as any other trier of fact who has announced his decision from the bench. It is naive to believe that the Referee might, after still more days of trial, "reverse himself" and thus admit that all of the trial time and efforts had been expended for naught.

Or to put it paradoxically, the Referee's decision for the Debtors on the main issues meant to him that he had jurisdiction to hear the matter; by the same token, a final decision for Appellants would have meant that he did not have jurisdiction to hear the case and make such a decision.

What then could the Appellants possibly have hoped to gain by going forward with evidence at this point?

POINT SIX.

On Principles of Equity the Debtors Are Not Entitled to Relief in the Bankruptcy Court.

In examining the record in this case, it is easy to conclude that the Debtors are not before this Court because of a concern for their creditors, unless they have had a sudden change of heart. They have admitted a continuous chain of constant attempts to defraud their creditors by concealing their assets and in general avoiding the payment of their obligations except when inescapably forced to do so. There is testimony by the Debtors that, not only did they conceal all of their real property by having other persons take title thereto, they even banked their funds under someone else's name [Rep. Tr. Vol. XI, p. 1325]. The principal Debtor, Franklin, has been forced to admit that his true name is not Franklin [Rep. Tr. Vol. IV, p. 428], that he has used other names [Rep. Tr. Vol. IV, pp. 467, 468] and that he is a convicted felon [Rep. Tr. Vol. IV, p. 420].

Even their chief witness, Curtis W. Reedy, has admitted that, *at Franklin's request*, he has obtained funds by falsely claiming the Debtor's property as his own [Rep. Tr. Vol. VIII, pp. 938, 939], and that the same tactics were used with other lending institutions [Rep. Tr. Vol. VIII, pp. 948-949].

The Debtors have dealt in fictitious trust deeds, illegally attempted to sub-divide real property, and left a trail of unpaid debts and foreclosed trust deeds from

beginning to end. Their schedules list 27 recorded Abstracts of Judgment and a total of \$320,000.00 in unpaid unsecured creditors. It is almost inconceivable that they now have the effrontery to come before a Court of Equity and pray for assistance.

Dated this 22nd day of September, 1966.

Respectfully submitted,

JOHN P. STODD,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOHN P. STODD

LIST OF EXHIBITS.

Debtors' Exhibits	Marked For Identification	Offered Into Evidence	Admitted Into Evidence
1.	P.	P. 86	P. 86
2.		88	90
3.		96	98
4.		105	105
5.		115	115
6.		121	122
7.		122	122
8.		124	124
9.	142		
10.	142		
11.		143	144
12.		143	144
13.		147	147
14.		148	150
15.		155	155
16.		156	156
17.	158		
18.	164	1375	1375
19.	164	1376	1376
20.		164	164
21.		168	168
22.		169	169
23.		170	170
24.		171	171
25.		171	172
26.		199	199
27.	218		
28.		222	222
29.		224	224
30.		231	231
31.		240	240
32.	242	812	813

<u>Debtors'</u> <u>Exhibits</u>	<u>Marked For</u> <u>Identification</u>	<u>Offered</u> <u>Into</u> <u>Evidence</u>	<u>Admitted</u> <u>Into</u> <u>Evidence</u>
33.		245	245
34.	255	811	811
35.		260	260
36.	280		
37.		281	281
38.	331	285	817
39.	297	817	817
			&
			1127
40.	298	817	817
			&
			1127
41.		304	304
42.	310	1167	1167
43.		320	321
44.		324	324
45.		326	327
46.	328	327	828
47.	351	867	867
48.		354	354
49.		354	354
50.	356	1317	1317
51.		358	358
52.		371	371
53.		372	372
54.	376	1319	1319
55.	376	1410	1410
			&
			1506
56.		378	379
57.		379	379
58.		384	384
59.		387	387

<u>Debtors'</u> <u>Exhibits</u>	<u>Marked For</u> <u>Identification</u>	<u>Offered</u> <u>Into</u> <u>Evidence</u>	<u>Admitted</u> <u>Into</u> <u>Evidence</u>
60.		387	388
61.		391	391
62.		397	397
63.	398		
64.	409		1490
65.	411		1490
66.		544	544
67.		545	545
68.	590	845	845
69.	626	861	861
70.	626	863	863
71.	645	710	710
72.	645	710	710
73.		659	659
74.		698	698
75.			
76.	793	850	850
77.		818	819
78.	824	1019	1020
79.	844	1345	1345
80.		861	861
81.		869	869
82.		869	869
83.		870	870
84.	881	890	891
85.	881	890	891
86.		890	890
87.		1055	1055
88.	1072A	1364	1365
89.	1079	1136	1137
90.		1112	1112
91.		1123	1123
92.		1124	1126

<u>Debtors'</u> <u>Exhibits</u>	<u>Marked For</u> <u>Identification</u>	<u>Offered</u> <u>Into</u> <u>Evidence</u>	<u>Admitted</u> <u>Into</u> <u>Evidence</u>
93.	1135		1136
94.	1138	1335	1335
95.	1140		
96.		1141	1141
97.			1144
98.		1146	1147
99.	1153	1463	1464
100.		1159	1159
101.		1165	1165
102.		1171	1171
103.	1172	1310	1310
104.	1172	1307	1307
105.	1173	1309	1310
106.		1181	1181
107.		1181	1181
108.		1183	1183
109.		1184	1184
110.	1256	1276	1277
111.	1257	1276	1277
112.		1328	1328
113.		1376	1376
114.	1424		
115.		1461	1461
116.	1466	1464	1507
117.	1486	1490	1490
118.		1508	1509
119.	1723		
120.	1735		
121.	1736		

<u>Respondents'</u> <u>Exhibits</u>	<u>Marked For</u> <u>Identification</u>	<u>Offered</u> <u>Into</u> <u>Evidence</u>	<u>Admitted</u> <u>Into</u> <u>Evidence</u>
1.			P. 12
2.	P. 15	P. 13	303
3.	474	1413	1413
4.		479	479
5.	480	1413	1413
6.	556	558	558
7.	970		
8.	1029	1036	1036

No. 20991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET
CENTER, INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of
JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN,
LEATRICE FRANKLIN and FLORENCE FITZGERALD,
also known as FLORENCE JANES, as Joint Venturers or
Copartners, and JOSEPH J. FRANKLIN, also known as J. J.
FRANKLIN, LEATRICE FRANKLIN and FLORENCE
FITZGERALD, also known as FLORENCE JANES, in-
dividually,

Appellees.

BRIEF OF APPELLEES.

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No. 20991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET
CENTER, INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of
JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN,
LEATRICE FRANKLIN and FLORENCE FITZGERALD,
also known as FLORENCE JANES, as Joint Venturers or
Copartners, and JOSEPH J. FRANKLIN, also known as J. J.
FRANKLIN, LEATRICE FRANKLIN and FLORENCE
FITZGERALD, also known as FLORENCE JANES, in-
dividually,

Appellees.

BRIEF OF APPELLEES.

Jurisdiction.

This is an appeal from an order of the district court
[Cl. Tr. 151]¹ affirming an order of the Referee in
Bankruptcy [Cl. Tr. 145], quieting title to real prop-
erty in Appellees. The court has jurisdiction of this ap-
peal under Section 24a of the Bankruptcy Act, 11
U.S.C. Section 47a.

¹The transcript of record in this court is in two volumes. The
first volume is the clerk's transcript of proceedings, and references
to it are cited as "Cl. Tr." The second volume is the reporter's
transcript, consisting of sixteen volumes, and references to it are
cited as "R. Tr."

Statement of the Case.

These proceedings commenced on August 26, 1964, when Appellees filed a petition for arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act [Cl. Tr. 115]. Appellees remained in possession of their assets as "debtors-in-possession" under Section 342 of the Act [Cl. Tr. 115], and a committee of creditors was appointed to advise Appellees in managing their affairs [Cl. Tr. 165]. Appellees' schedule of assets and liabilities listed among their assets a 5.84 acre parcel of unimproved real property located on Katella Avenue, Anaheim, California (hereafter referred to as the "Katella property") [Cl. Tr. 137]. Ownership of the west one-half of this property is the subject of this appeal.

This controversy arose because Crenshaw Carpet Center, Inc. and its attorney Marvin B. Kapelus transformed a sale of carpeting for \$7,874 [Cl. Tr. 90] plus an advancement of \$3,317 [Cl. Tr. 95] into record title to 116,160 square feet of unimproved property [Cl. Tr. 110] having a net value to Appellees of about \$380,000.²

The relationship between Appellants and Appellees began in June, 1961. The Appellees, as family joint

²Appellees were the owners of 5.84 acres on Katella Avenue, across from Disneyland and adjacent to the Melodyland Theatre [Cl. Tr. 99]. The west one-half of the property consisted of 116,160 square feet [Cl. Tr. 110], had a gross value of \$464,000 when valued as part of the whole 5.84 acres [Cl. Tr. 110], was subject to a first deed of trust securing a promissory note in the amount of \$84,609 [Cl. Tr. 100], and thus had an equity of about \$380,000. The east one-half of the property consisted of 119,613 square feet, had a gross value of \$478,000 when valued as part of the whole 5.84 acres, and was subject to six separate first deeds of trust to secure six notes totalling \$156,000 [Cl. Tr. 100].

venturers, were constructing two motels in Anaheim, California, when they purchased carpeting for one motel from Crenshaw for \$7,784 [Cl. Tr. 90]. The carpeting was installed, but when Appellees were unable to meet their instalment payments, Kapelus, in June of 1962, filed suit for Crenshaw, and by writ of attachment placed a keeper in each motel [Cl. Tr. 91]. To secure removal of the keeper, the Appellees, while not represented by counsel, stipulated to entry of a judgment of \$9,461 and executed a promissory note for that amount secured by a junior deed of trust covering eight different parcels of Appellees' property [Cl. Tr. 91-92]. Appellees defaulted on that note [Cl. Tr. 92]. Crenshaw began foreclosure under its deed of trust [Cl. Tr. 92] and simultaneously executed upon the judgment again by placing keepers in Appellees' motels during the 1962 Christmas holidays [Cl. Tr. 92-93].

Appellees entered into an agreement to secure withdrawal of the keeper and to forestall foreclosure under Crenshaw's deed of trust. For this concession, Appellees agreed to obtain and assign to Crenshaw an existing note and second deed of trust on one of their new apartment houses (Lot 8 of Tract 3535). In return, Crenshaw, through Kapelus, agreed to release the keeper and reconvey the blanket deed of trust [Cl. Tr. 93-94]. Although Appellees had reduced their indebtedness to Crenshaw to \$8,141, the note which was assigned to Crenshaw was in the face amount of \$9,000, and Crenshaw granted an option to Appellees to repurchase the note for its face value [Cl. Tr. 93]. An escrow was opened and the transaction was consummated in late January, 1963 [Cl. Tr. 94-95]. When Kapelus discovered that Schmeier, the holder of that deed of trust

on Lot 8, had filed a notice of default in October, 1962, he instructed the trustee to proceed to foreclosure sale under the Schmeier default notice [Cl. Tr. 95-96].

Crenshaw's legal right to foreclose on Lot 8 was the subject of a bitter dispute with Appellees from January, 1963, through July, 1963. The trustee under the deed of trust advised Kapelus that a valid trustee's sale could not be conducted under the Schmeier notice of default [Cl. Tr. 96]. Kapelus disagreed, and over Appellees' objections, the trustee conducted a sale on July 31, 1963 [Cl. Tr. 96]. Crenshaw made a beneficial bid of \$13,910 at the sale (the amount represented what was due under the note plus advances of \$3,317 made in January, 1963, to the holder of the first deed of trust on Lot 8) [Cl. Tr. 96-97]. Appellees disputed the validity of the trustee's sale and instructed their attorney to file an action to set it aside [Cl. Tr. 98].

Between July 31 and August 15, 1963, the parties settled the dispute over title to Lot 8 by agreeing upon a new security transaction. Shortly after the trustee's sale of Lot 8, Appellees suggested that Crenshaw and Kapelus reconvey title to Lot 8 to Appellees in exchange for additional security for the judgment debt and advances [Cl. Tr. 98-99]. Kapelus and Crenshaw agreed [Cl. Tr. 99]. Under the new security arrangement, Appellees agreed to execute a promissory note for \$15,000 payable in 30 days. The note was to be secured by a deed of trust on two parcels: Lot 8, and Appellees' equity of about \$380,000 in the west one-half of the Katella property [Cl. Tr. 98-99].³

³Although Curtis W. Reedy was the record owner of the Katella property, he held title only for the purpose of obtaining financing, and at all times he was holding the property for Ap-

On August 26th the parties opened an escrow at United Title Guaranty Company, at Santa Ana, California, to effect the new security transaction [Cl. Tr. 101].

As soon as the escrow opened Kapelus demanded an increase in the indebtedness to be shown. Kapelus instructed the escrow officer to prepare amendments to the escrow instructions raising the amount of the note from \$15,000 to \$20,000, changing the rate of interest on the note from 8% to 10%, providing for an A.T.A. policy of title insurance, providing for the payment to Crenshaw of the August rents on the Lot 8 apartments [Cl. Tr. 102-103], and placing the burden of all escrow costs and title policy fees on Appellees [Cl. Tr. 104]. Appellees reluctantly complied with these demands [Cl. Tr. 103-104].

Kapelus next insisted that the form of the transaction be changed. Instead of a deed of trust encumbering Lot 8 and the west one-half of the Katella property, Kapelus demanded that he and Crenshaw be vested with fee title to the west one-half of the Katella property and they would give Appellees an option to repurchase the property [Cl. Tr. 104-105].

Appellees finally agreed to the new security transaction proposed by Kapelus [Cl. Tr. 105, 107-109]. The debt due from Appellees to Appellants would be increased to \$20,500 payable January 26, 1964 [Cl. Tr. 108]. Appellees would give Crenshaw and Kapelus a deed to the west one-half of the Katella property as security for the \$20,500 debt [Cl. Tr. 108], but Appellees

pellees and acting as their agent [Cl. Tr. 100-104]. Crenshaw and Kapelus knew this [Cl. Tr. 101], and there is no question but that Appellees were always the real parties in interest. On August 20, 1964, Curtis W. Reedy quitclaimed his record interest in the property to Appellees [Cl. Tr. 100].

were to remain in possession [Cl. Tr. 109]. To protect Appellees against a possible interim conveyance or encumbrance by Appellants, Appellees would be granted an option through January 26, 1964, to repurchase the property for the amount of the \$20,500 debt, and the option would be recorded immediately following recordation of the deed [Cl. Tr. 109]. Appellees were to pay the August rents on Lot 8 to Appellants, and Appellees were to pay all costs of the escrow [Cl. Tr. 108-109]. And, finally, Crenshaw would reconvey Lot 8 to Appellees [Cl. Tr. 108].

The parties met at United Title Guaranty Company on September 23, 1963, to consummate the transaction [Cl. Tr. 107]. The title company had previously determined on September 17 that the transfer, if consummated, would amount to nothing more than a "mortgage" [D-41].⁴ It therefore refused to issue any policy of title insurance unless the parties would execute a statement to and "For the benefit of Western Title Insurance Company" that the deed to the west one-half of the Katella property was an absolute conveyance and was not intended as a mortgage [Cl. Tr. 106-107]. All necessary documents were executed [Cl. Tr. 109], including the statement demanded by the title company [Cl. Tr. 108]; the escrow closed and the deed and option were recorded on October 10, 1963 [Cl. Tr. 110]. Title to Lot 8 was vested in Appellees; title to the west one-half of the Katella property was vested of record in Crenshaw and Kapelus; and Appellees remained in actual possession of the west one-half of the Katella property [Cl. Tr. 109].

⁴"D-...." refers to Appellants' exhibits admitted into evidence at the trial; "R-....." refers to the exhibits of Kapelus and Crenshaw.

Prior to the expiration date in the option, January 26, 1964, Appellees tendered the \$20,500 option price to Appellants. On December 31, 1963, Appellees telegraphed Kapelus and Crenshaw that they were ready to exercise the option [Cl. Tr. 111]. Kapelus refused to take payment through any escrow but insisted upon delivery of the \$20,500 to his law office [Cl. Tr. 112]. Appellees met Kapelus by appointment in his office on January 21, 1964, and handed him a certified check for \$20,500 in exchange for a deed to the west one-half of the Katella property [Cl. Tr. 112]. Kapelus instructed his secretary to prepare the deed and asked the Appellees to go to lunch while he obtained the necessary signatures on the deed [Cl. Tr. 113]. Upon their return from lunch, Kapelus advised Appellees he would not deliver the deed and would not accept the certified check [Cl. Tr. 49].

On January 24, 1964, Appellees filed an action in the Superior Court of the State of California, for the County of Orange, to quiet title to the west one-half of the Katella property [Cl. Tr. 114-115] and to declare the deed to Appellants to be in fact a mortgage [Cl. Tr. 44-45]. Appellees filed their answer [Cl. Tr. 62-70], and a pre-trial conference order was entered setting the case for a non-jury trial [Cl. Tr. 18]. After the Chapter XI proceedings were filed, Appellees, as statutory debtors-in-possession, filed an application in the bankruptcy court to quiet title to the west one-half of the Katella property [Cl. Tr. 40]. The application alleged two causes of action: First, to declare the deed to be in fact a mortgage; and, second, to avoid the transfer to Appellants as a fraudulent conveyance under Section 67d of the Bankruptcy Act or Section 3439.04

of the Civil Code of the State of California [Cl. Tr. 41-42]. Appellants objected to the jurisdiction of the bankruptcy court and answered on the merits [Cl. Tr. 59].

The Referee in Bankruptcy overruled Appellants' objection to jurisdiction and after further trial ruled in favor of Appellees on the merits on both causes of action. The Referee found that Appellees were in actual possession of the west one-half of the Katella property on the date the Chapter XI proceedings were filed [Cl. Tr. 109-114]. With respect to the first cause of action, the Referee found that the evidence was "unequivocal, clear and convincing" that the deed and option to purchase "were nothing more than a disguised security transaction and a mortgage" [Cl. Tr. 116], and, furthermore, the option to repurchase was properly and timely exercised [Cl. Tr. 112-113, 116]. With respect to the second cause of action, the Referee found that the deed, if not a mortgage, was not supported by fair consideration, rendered Appellees insolvent [Cl. Tr. 115], and was therefore voidable as a fraudulent transfer under Section 67d(2)(a) of the Bankruptcy Act and Section 3439.04 of the Civil Code of the State of California [Cl. Tr. 120]. Accordingly, the Referee made his findings of fact and conclusions of law [Cl. Tr. 89] and entered his order quieting title in Appellees and granting Appellants a lien to secure the debt of \$20,500 [Cl. Tr. 145-146].⁵

⁵The Referee's original order [Cl. Tr. 121], by mistake, fixed the amount of Appellants' debt secured by the lien at \$12,-842.47. This order was corrected by a *nunc pro tunc* order entered prior to the affirmance on review by the district judge [Cl. Tr. 145].

On March 1, 1966, the district court determined that the Referee's findings of fact were not clearly erroneous, his conclusions of law were correct, and affirmed the Referee's order and denied Appellants' petition for review [Cl. Tr. 151-152].

SUMMARY OF ARGUMENT.

On the merits, Appellees are entitled to affirmance on any of three independent legal theories: *First*, California law is well-settled that a deed can always be proved to be a mortgage. Here, the Referee found that evidence "unequivocal, clear and convincing" that the deed from Appellees to Appellants was in fact a mortgage. That finding is not clearly erroneous. It is supported by a compelling preponderance of the evidence, including the fact that, while Appellees' equity in the property was \$380,000, the alleged "purchase" price was only \$20,500. Appellants opposed this overwhelming proof with only the deed, a written statement that the deed was not intended to be a mortgage, and the testimony of one of the Appellants. California gives the deed and estoppel statement no legal weight, in the face of substantial evidence to the contrary, and the witness was so thoroughly impeached that the Referee found Appellants' claim had "no real or substantial merit". *Second*, the Referee's finding that Appellees complied with the terms of the option to repurchase was not clearly erroneous. *Third*, even if the deed was absolute, it was voidable under the Bankruptcy Act as a fraudulent transfer.

Further, it is clear that the bankruptcy court had summary jurisdiction to try the merits. Summary jurisdiction extends over real property in the actual possession

of a debtor at the time of the filing of a Chapter XI petition. The Referee found that Appellees were in actual possession of the west one-half of the Katella property when these proceedings were instituted. That finding is not clearly erroneous but is supported by numerous acts of possession. Moreover, even if Appellants were in actual possession of the property, they were not bona fide adverse claimants because they totally failed to demonstrate any arguable factual basis for their claim, which the Referee found had "no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary". In addition, the grant of jurisdiction in Chapter XI proceedings extends to any property owned by the debtor, whether or not he is in possession.

The remainder of Appellants' arguments are likewise without merit. Contrary to Appellants' claims, they were given ample opportunity to produce evidence on jurisdiction and on the merits, although they chose not to do so. Appellants' argument that the bankruptcy court should have surrendered its jurisdiction to the state court ignores the plain command of the Supreme Court that abstention is called for only when state law is unsettled. Here, California law is well-settled that a deed can always be proved to be a mortgage. Finally, the relief sought by Appellees is not barred by any equitable principle of "unclean hands". Appellees instituted this action as debtors-in-possession for the benefit of their creditors. Moreover, Appellants cannot demonstrate that they themselves were adversely affected by Appellees' alleged misconduct. The judgment is right and correct.

ARGUMENT.

I.

Appellees Are Entitled to Judgment on the Merits.

The lower court's judgment quieting title to the west one-half of the Katella property is supportable on three independent legal theories: (1) The transaction between the parties was nothing more than a disguised security transaction and the deed was in fact a mortgage; (2) The option to repurchase was timely and properly exercised; and (3) the transaction, if a conveyance, was a voidable fraudulent transfer under the Bankruptcy Act and California law. The Referee in Bankruptcy made findings of fact which support judgment for Appellees on each theory. Those findings are not clearly erroneous⁶ and the judgment is correct.

A. The Referee's Finding of Fact That the Deed Was in Fact a Mortgage Is Not Clearly Erroneous.

One of the bases for the lower court's judgment quieting title to the subject property in Appellees was the Referee's finding that it was the mutual intention of the parties that the deed was in fact a mortgage [Cl. Tr. 119]. The Referee found [Cl. Tr. 116]:

"The evidence is unequivocal, clear and convincing that it was the mutual intention of all parties that the instrument in the form of a deed, dated September 23, 1963, purporting to convey to [Appellants] the west one-half of the Katella prop-

⁶Appellants urge an erroneous standard for appellate review of the Referee's findings of fact. Appellants argue that they are entitled to judgment on the merits because the Referee's decision "is not supported by the evidence" (App. Op. Br. p. 24). But this court cannot reverse the Referee's findings unless they are "clearly erroneous." General Order in Bankruptcy No. 47; Fed. R. Civ. P. 52(a).

erty and the option instrument were nothing more than a disguised security transaction and a mortgage.”

The law in California is firmly settled that a deed, absolute on its face, can always be proved to be a mortgage in fact. Section 2925 of the California Civil Code provides in part:

“The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved . . . though the fact does not appear by the terms of the instrument.”

And if the deed is transferred “. . . as a security for the performance of another act, [it] is to be deemed a mortgage, . . .” Cal. Civ. Code §2924.

No matter what form the transaction takes, the California courts will pierce the form of the documents to determine the true intention of the parties. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 147 P. 2d 583 (1944). In *Beeler* the court clearly stated the rule (24 Cal. 2d at 21, 147 P. 2d at 594):

“In *Vance v. Anderson*, 113 Cal. 532, 538 [45 P. 816] this court set forth the basic doctrine as follows: ‘A deed absolute on its face may be shown, by parol, to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such a way as to carry out the true in-

tention of the parties to the agreement, . . . 'To insist on what was really a mortgage, as a sale, is in equity a fraud *which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.*'"

Whether a deed was given only for security must be determined from the intention of the parties by looking into all of the facts and circumstances of the transaction, *Beeler v. American Trust Co.*, *supra*, and this determination is for the trial court.⁷ *Greene v. Colburn*, 160 Cal. App. 2d 355, 325 P. 2d 148 (1958).

The Referee's finding that the deed was in fact a mortgage cannot be set aside unless it is "clearly erroneous." General Order in Bankruptcy No. 47; Fed. R. Civ. P. 52(a). An appellate court will not reverse a finding of fact unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948). And in reviewing findings of fact, the appellate courts are instructed that "due regard

⁷Appellants' reliance upon *Workmon Constr. Co. v. Weirick*, 223 Cal. App. 2d 487, 36 Cal. Rptr. 17 (1963) is misplaced. In *Workmon* the appellate court simply affirmed the trial court's finding that the deed was not a mortgage because the evidence was conflicting and could not be reevaluated by the reviewing court. Appellants' assertion that the facts in *Workmon* are "very similar to the present facts" is misleading. Among other things the court in *Workmon* pointed out that one of the parties who sought to declare the deed a mortgage was an attorney highly experienced in real estate transactions, while the holder of the deed had not been represented by counsel. The court further pointed out that there was no real evidence of a subsisting debt and that there was a private written agreement among the plaintiffs that negated a mortgage. As the court pointed out, each case must be judged on its own facts because "each turns upon the parol evidence peculiar to the particular case." *Workmon Constr. Co. v. Weirick*, *supra*, 223 Cal. App. 2d at 491, 36 Cal. Rptr. at 20.

shall be given to the opportunity of the trial court to judge of the credibility of witnesses.” Fed. R. Civ. P. 52(a). Accordingly, when a finding of fact “is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous.” *Costello v. Fazio*, 256 F. 2d 903, 908 (9th Cir. 1958). *Accord: Olympic Finance Co. v. Thyret*, 337 F. 2d 62 (9th Cir. 1964); *Hoppe v. Rittenhouse*, 279 F. 2d 3 (9th Cir. 1960); *Grace Bros., Inc. v. Commissioner of Internal Revenue*, 173 F. 2d 170, 174 (9th Cir. 1949). See 5 Moore, Federal Practice, ¶52.03[1], p. 2615 (2d Ed. 1953).

A brief review of the evidence clearly demonstrates that the Referee’s finding that the deed and option to repurchase constituted a disguised security transaction is not clearly erroneous, but, on the contrary, is supported by “unequivocal, clear and convincing” evidence [Cl. Tr. 116].

From July 31, 1963 (the date of the foreclosure sale of the Lot 8 apartment house) [Cl. Tr. 98] to September 12, 1963, the parties were negotiating a security transaction. As early as August 15th Kapelus had agreed to have Crenshaw reconvey Lot 8 in exchange for a deed of trust covering both Lot 8 and the west one-half of the Katella property [Cl. Tr. 98] to secure the debt of \$15,000. In fact, Kapelus prepared the quitclaim deed to Lot 8 on August 15th and had it acknowledged by Crenshaw on that day [Cl. Tr. 101]. On August 26, 1963, when escrow No. 6363-RB was opened at United Title Guaranty Company, escrow instructions were prepared [D-34] calling for a note of \$15,000 at 8% interest secured by a deed of trust on

the west one-half of the Katella property and Lot 8, and for the reconveyance of Lot 8 to Appellees [Cl. Tr. 101, D-34]. Appellees executed the note for \$15,000 [Cl. Tr. 102, D-32], signed the escrow instructions [D-34], and executed the deed of trust on Lot 8 and the west one-half of the Katella property [Cl. Tr. 102].⁸

After receiving his copies of the escrow instructions on August 27, 1963 [Cl. Tr. 102], Kapelus instructed the escrow officer to draw a series of amendments to the escrow instructions. Kapelus demanded that the note be raised from \$15,000 to \$20,500, that it bear interest at 10% rather than 8%, that Appellees obtain a policy of title insurance for \$20,500, that Appellees pay the August rents on Lot 8 through escrow [Cl. Tr. 102], and that Appellees pay all escrow and title insurance costs [Cl. Tr. 104]. Those amendments were drawn [Cl. Tr. 104, D-92, D-89] and Appellees executed the necessary documents [Cl. Tr. 103-104].

There can be no question but that this escrow was a loan transaction. If it had been consummated there would be no controversy before this court.

But then Kapelus insisted that the form of the security transaction be changed to eliminate the possibility of the kind of foreclosure problem he had with Lot 8. Kapelus wanted none of the time, trouble or expense associated with another foreclosure proceeding [R. Tr. 1349]. His motivations were typical.⁹

⁸Although the documents were actually signed by Reedy, he was merely acting as Appellees' agent [Cl. Tr. 104].

⁹See *In re 716 Third Avenue Holding Corp.*, 340 F. 2d 42, 47 (2d Cir. 1964) where the court stated:

"There are strong motivations which induce parties to resort to a subterfuge of clothing a mortgage in the guise of

(This footnote is continued on the next page)

As a result of Kapelus' demands, a new escrow (No. 5980-RB), which superseded the previous loan escrow (No. 6363-RB), was opened at United Title Guaranty Company to effect the new agreement [Cl. Tr. 106]. The terms of the new escrow were strikingly similar to the loan escrow: Appellees would get title to Lot 8; Kapelus and Crenshaw would get title to the west one-half of Katella to secure an indebtedness of \$20,500; Appellees would pay Crenshaw the August rents on Lot 8; and Appellees would pay all escrow costs and title insurance fees [Cl. Tr. 107-109].

The intention of the parties that the deed was to be security for the \$20,500 debt was corroborated by a compelling preponderance of evidence. The debt was not satisfied, was outstanding when the deed was given to Kapelus and Crenshaw, and is still outstanding [Cl. Tr. 109].¹⁰ There had been a history of Appellees' giving Crenshaw deeds of trust as security for the debt: First a blanket deed of trust [Cl. Tr. 94], then a deed of trust on Lot 8, and then a deed of trust on Lot 8 and the west one-half of the Katella property. And the option to repurchase is probative of a security transaction, particularly when Appellees had to exer-

an outright conveyance. The lender seeks thereby to avoid the time and expense of foreclosure proceedings and the possible loss of a substantial profit while his acquisition of title is delayed by a redemption period fixed by a court and if a borrower is in desperate financial circumstances, he will of necessity accede to the lender's demand; . . ."

¹⁰Kapelus unsuccessfully attempted to establish at trial that the debt had been satisfied. He testified that he prepared an assignment of the judgment [R. Tr. 997] and mailed it to Albert Barnett for signature and then mailed it to Appellees on December 6, 1963 [R. Tr. 998]. Appellees did not receive the assignment of judgment, and although Albert Barnett, president of Crenshaw, testified at the trial [R. Tr. 1425], he did not testify that he ever saw or signed the assignment. Moreover, no such assignment was ever filed in the Superior Court action [R. Tr. 1001].

cise the option within the equivalent time it took to foreclose under a deed of trust. Appellees paid all escrow costs and title insurance fees on Lot 8 and the west one-half of the Katella property, although it was the custom in Southern California in escrows involving straight trades of property to divide those costs [Cl. Tr. 110]. See, *Workmon Constr. Co. v. Weirick*, 223 Cal. App. 2d 487, 36 Cal. Rptr. 17 (1963).

One of the most important earmarks of a security transaction is a great inequality between the value of the property conveyed and the alleged "price" paid for it. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 17, 147 P. 2d 583, 595 (1944); *Orlando v. Berns*, 154 Cal. App. 2d 753, 756, 316 P. 2d 705, 707 (1957). Great weight is placed on such disparity because an owner is not likely to sell his property for a price substantially below its market value. As the court stated in *In re 716 Third Avenue Holding Corp.*, 340 F. 2d 42, 46 (2d Cir. 1964):

"The importance of value in this case is obvious. If there was credible evidence that the leasehold at the time of the assignment had a fair market value of \$60,000 or anything in the range of two or three times the sum received by the assignor, it is highly unlikely that the conveyance was understood or intended by the parties to be an outright sale."

In *716 Third Avenue Holding Corp.*, *supra*, property worth \$60,000 was conveyed for a consideration of \$22,000; in *Beeler*, *supra*, property worth \$135,000 was conveyed for a consideration of \$75,000. In the present case property with an equity of about \$380,000 was

transferred of record for a consideration of \$20,500 [Cl. Tr. 110].¹¹

Appellees' overwhelming case establishing that the deed was a mortgage was opposed only by the deed [R-1], the estoppel statement [R-2], and the testimony of attorney Marvin B. Kapelus.

A deed may always be proved to be in fact a mortgage and an estoppel statement has no better standing. In *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 15, 147 P. 2d 583, 591 (1944), a strikingly similar circumstance occurred. There the bank forwarded to plaintiff for his execution a deed of conveyance, bill of sale, and a lease and option agreement. Along with these papers the bank also sent to the plaintiff for signature an affidavit "made particularly for the benefit of the (title company)" certifying the nature of the transaction as an absolute conveyance. The title company demanded the affidavit before it would issue a title policy. In disposing of that affidavit, the court in *Beeler* said (24 Cal. 2d at 22-23, 147 P. 2d at 595):

"If by a separate writing the parties expressly agree, at the same time an absolute deed is executed, that it is what it purports to be, that is, an absolute sale, that would be no more than what the deed itself says. Therefore, if they could thus avoid its real effect as a mortgage, the true nature of such a transaction could never be shown, and the policy of the law never to permit a security to be converted by *any* contemporaneous agreement into a sale could be constantly evaded."

¹¹See footnote 2, *supra*.

The estoppel statement Appellants rely upon was prepared by officers of the title company for their own benefit¹² [R-2; R. Tr. 1159-1161; Cl. Tr. 106] and they wrote Kapelus that unless it was signed “. . . *this would have to be treated as a deed in lieu of a mortgage and would not be insurable . . .*” (Emphasis supplied) [D-41; R. Tr. 1161-1162].

The Witness Kapelus.

The only testimony Appellants offered was that of the interested party, Kapelus. Only his testimony was offered to support Appellants' contentions that the deed was not a mortgage and that the option was not properly exercised.

It can be stated without any qualification whatsoever that there is no record in any civil litigation where a single witness was more thoroughly impeached than was Kapelus. Although he is a member of the California Bar, Kapelus' testimony was incredibly replete with contradictions, inconsistencies, evasive voluntary statements, faulty recollections, inherently improbable assertions, extravagant claims, and downright misstatements of fact. He was repeatedly contradicted by documentary evidence of the highest probative value and by numerous independent witnesses.

¹²Appellants imply the statement was executed for their benefit (App. Op. Br. pp. 5, 25). But the statement, by its own terms, was “For the benefit of Western Title Insurance Company” [R-2].

Detailed record references to Kapelus' testimony are set forth in the Appendix to Appellees' brief. There the most glaring examples of his impeachment are collected.

When it developed that Kapelus' involvement in loan escrow No. 6363-RB was highly significant evidence of a security transaction, Kapelus denied [R. Tr. 1044-1046] any knowledge of or participation in that escrow (Appendix A). Kapelus claimed [R. Tr. 1044] that there never was any agreement for a note and deed of trust transaction; that he did not give any instructions to the escrow officer concerning that escrow [R. Tr. 1001-1002]; that when he received the August 26, 1963 escrow instructions from the escrow officer he threw them in the "waste paper basket" [R. Tr. 780, 1002]; and he denied signing any documents in connection with that loan escrow [R. Tr. 1046]. Kapelus was impeached by proof of his signature to the cancellation instructions [D-37; R. Tr. 1046].

The most damaging impeachment evidence of all was the memorandum in Kapelus' own handwriting found with the loan escrow papers [D-87] (Appendix A). Three of the amendments to the loan transaction, which Kapelus denied giving instructions about, were the raising of the interest from 8% to 10%, the requirement of an A.T.A. extended coverage policy, and the payment of the August apartment rents on Lot 8 through escrow. The Kapelus memorandum [D-87] contains three notations of significance:

From the desk of



10% interest

60,772.90
20,500.00
81,272.90

ATA Ext. Co. policy

Rents!

LAW OFFICES

MARVIN B. KAPELUS

8271 MELROSE AVE.

LOS ANGELES 46, CALIF.

OLympic 3-5684

Each of these terms was embodied in amendments to the loan escrow. Yet Kapelus denied any recollection of making those notes [R. Tr. 1056], and he did not know how the memorandum got into the files of the escrow officer "unless it fell out of another file and out of my briefcase" [R. Tr. 1056]. Moreover, Kapelus testified the memorandum could have related to "any one of a dozen things I have handled" [R. Tr. 1057], even though the escrow officer testified that he, Broussard, wrote the figures "60,772.90, 20,500.00 and 81,272.90" on the memorandum [R. Tr. 1128].

Kapelus denied that he prepared the quitclaim deed to Lot 8. He was promptly impeached by his own secretary and by his own client [R. Tr. 1191, 1436] (Appendix B).

It quickly became apparent that Kapelus' trial testimony was in direct conflict with his deposition testimony. When he became aware of this, Kapelus first insisted his deposition was incorrectly transcribed [R. Tr. 1091, 681]. When the deposition reporter was produced as a witness, Kapelus remembered he had made corrections in the *original* of his deposition. But when the original of his deposition was finally produced, and it contained no corrections, Kapelus then remembered that the corrections had been made in a copy [R. Tr. 1037, 1039]. The copy, with minor changes, was finally produced [D-78]. Kapelus, near the close of trial, found it at the home of his client [R. Tr. 1037] (Appendix C).

Kapelus testified he did not receive Appellees' telegram of December 31, 1963 [R. Tr. 372, 373], then admitted he did receive it [R. Tr. 584, 585]; and, when asked to produce the original, he claimed he had surrendered it at his deposition hearing [R. Tr. 585]. He was promptly impeached by the deposition reporter [R. Tr. 1018, 1019] (Appendix D).

Kapelus claimed he had not instructed his secretary to draw the deed back to Appellees at their meeting in his office on January 21, 1964 [R. Tr. 621]. He was impeached by four different witnesses [R. Tr. 1218, 353, 848, 1313] (Appendix E).

Kapelus claimed that the date in the option agreement was tampered with and altered to read January 26 instead of January 16 [R. Tr. 702-708]. He was

directly impeached by two witnesses and records of the Orange County Recorder [R. Tr. 244, 399, 830, 831; D-104, 105] (Appendix F).

Kapelus claimed he prepared and delivered an assignment of the judgment to Appellees on December 6, 1963 [R. Tr. 997, 1001]. He was impeached by Reedy and Franklin [R. Tr. 969, 370] and by his own deposition testimony [R. Tr. 1512-1513] (Appendix G).

Kapelus claimed that he, not officers of the title company, demanded preparation and execution of the estoppel statement [R. Tr. 1116]. He was impeached by the document itself [R-2, D-100, D-41], by the escrow officer and others [R. Tr. 1158, 1159, 1160] (Appendix H).

Indeed, Kapelus' incredulous story could aptly be described as "standardized forms of falsehood so often reiterated as to be neither credible nor interesting." *In re Abesbaum*, 70 F. 2d 628-629 (2d Cir. 1934). See *Sahn v. Pagano*, 302 F. 2d 629, 632 (2d Cir. 1962). Although an appellate court cannot X-ray through the record to see the additionally convincing element of demeanor, nevertheless it "should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52, 69 S. Ct. 1347, 1349 (1949).

B. The Referee's Finding of Fact That Appellees Complied With the Terms of the Option Is Not Clearly Erroneous.

Independent of his conclusion that the deed was a mortgage, the Referee also held that "the debtors complied with the terms of the option . . ." [Cl. Tr. 119] and Appellants' contrary contention had "no real or substantial merit" [Cl. Tr. 116; see Cl. Tr. 112-113].

When Appellees made a timely tender of the option price on January 21, 1964 [Cl. Tr. 112-113], they became entitled to the deed to the property and to the remedy of specific performance to compel delivery. *Elliott v. McCombs*, 17 Cal. 2d 23, 31, 109 P. 2d 329, 334 (1941); *Hersh v. Garou*, 218 Cal. 460, 23 P. 2d 1022 (1933); *O'Connell v. Lampe*, 206 Cal. 282, 274 Pac. 336 (1929); *Estate of Dwyer*, 159 Cal. 664, 115 Pac. 235 (1911).

Appellants take issue with the Referee's findings because, they allege, Appellees "did not make the trust deed payments", "did not pay the taxes when due", and there was something "highly unusual" about the tender of the \$20,500 (App. Op. Br. p. 27).

But the Referee found against Appellants on each of these issues on a record free of conflict [Cl. Tr. 112-113].

The Referee's finding that Appellees were not in default with respect to the interest payments on the first deed of trust [Cl. Tr. 112-113] is supported by conclusive evidence. A. L. Rist, husband of the note holder [R. Tr. 856], testified that he deferred payment of the January 1, 1964 interest to April 1, 1964 [R. Tr. 866] and that this extension cured any default [R. Tr. 868].

And the Referee's finding that there was no default with respect to the payment of taxes [Cl. Tr. 113] is correct. Although Appellants claim the taxes were not paid "*when due*" (App. Op. Br. p. 27), the only condition of the option was that the taxes were not to become "*delinquent*" [D-33; Cl. Tr. 113]. A Deputy Clerk in the Orange County Tax Collector's office testified that the taxes on the west one-half of the Katella

property did not become delinquent until January 26, 1964, five days after the tender on January 21, 1964 [R. Tr. 900]. Appellants' record reference (App. Op. Br. p. 27) simply establishes that the taxes could have been paid earlier—but they were not delinquent on the date of the tender. Moreover, Appellees paid, in cash, both the first and second installments on the west one-half of the property on February 10, 1964 [R. Tr. 900-901].

Finally, the Referee found that the option price was tendered to Appellants on January 21, 1964 by a certified check which was "the equivalent of cash and would have been honored by the issuing bank if presented to that bank by Kapelus or Crenshaw" [Cl. Tr. 113]. The check was introduced into evidence and clearly is "certified" [D-49]. An employee of the certifying bank, Bank of America, West Anaheim Branch, testified that the bank's certification of the check was "irrevocable" and when presented to the bank, it would have been paid [R. Tr. 547]. Appellants nevertheless imply that the tender was somehow defective because it was "highly unusual" and involved "trust funds" held by an escrow company. But the escrow clerk who handed the certified check to Kapelus [R. Tr. 1215] testified [R. Tr. 1226] that she personally talked to the person who had deposited the funds with the escrow company, and that person authorized the use of those funds to obtain the deed [Cl. Tr. 1226].

**C. If the Deed Is Not a Mortgage, It Is Voidable
as a Fraudulent Conveyance.**

Appellees do not even specify as error the Referee's alternative holding that the deed, if it was not a mortgage, was a voidable fraudulent conveyance [Cl. Tr. 129]. Yet this ground alone is sufficient to sustain judgment for Appellees.

The Bankruptcy Act grants a debtor-in-possession¹³ the power to avoid transfers which are made for less than fair consideration when the transferor is, or will be rendered, insolvent. Section 67d(2)(a) provides, in pertinent part:

“Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; . . .”

Every element of a fraudulent transfer was established at trial and found present by the Referee. The consideration for the transfer of the west one-half of the Katella property, if not a mortgage, had to be the satisfaction of the indebtedness of \$20,500, yet the property transferred had a net fair market value to the

¹³Section 342 of Chapter XI of the Bankruptcy Act vests in the debtor-in-possession the avoiding powers of a trustee in bankruptcy. Section 342 provides: “Where no receiver or trustee is appointed the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act . . .” Among such powers granted to the debtor-in-possession is the power to avoid fraudulent transfers under Section 67d. 4 Collier, *On Bankruptcy*, ¶67.29, pp. 330-332 (14th Ed. 1964).

debtors of \$380,000.¹⁴ Accordingly, the Referee found that: “The value of [Appellees’] interest in the west one-half of the Katella property was far in excess of the debt to Crenshaw and Kapelus and if the deed were an absolute conveyance, then it would not have been supported by fair consideration” [Cl. Tr. 115]. The Referee also found that the transfer, if absolute, would have rendered Appellees insolvent [Cl. Tr. 115].

Since the Referee also found that there were creditors in existence at the time of the transfer who had claims provable under the Bankruptcy Act [Cl. Tr. 115], he correctly concluded that an absolute transfer of the property would have been voidable by Appellees on behalf of their creditors [Cl. Tr. 120].

II.

The Bankruptcy Court Had Summary Jurisdiction to Quiet Title to the Katella Property.

A. Actual Possession of Real Property Supports Summary Jurisdiction and the Referee’s Finding of Fact That Appellees Were in Actual Possession Is Not Clearly Erroneous.

No principle of bankruptcy law is more clearly settled than that “bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual . . . possession.” *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 480, 60 S. Ct. 628, 629 (1940). Contrary to Appellants’ contention that actual possession is only a basis of jurisdiction when dealing with *personal property* (App. Op. Br. p.

¹⁴The Referee found that the west one-half of the Katella property had a gross value of \$464,000 [Cl. Tr. 110]. This property was subject to a first deed of trust of \$84,000 [Cl. Tr. 100].

13), it is clearly established that actual possession of *real property* at the time of the filing of the petition in bankruptcy is an adequate basis for summary jurisdiction. *Thompson v. Magnolia Petroleum, supra*; *In re J. Rosen & Sons, Inc.*, 130 F. 2d 81 (3rd Cir. 1942); *City of Long Beach v. Metcalf*, 103 F. 2d 483 (9th Cir. 1939). And contrary to Appellants' suggestion (App. Op. Br. p. 11),¹⁵ the fact that record title is in a stranger does not deprive the bankruptcy court of jurisdiction over real property. *Thompson v. Magnolia Petroleum, supra*; *Robinson v. Mann*, 339 F. 2d 547 (5th Cir. 1964); *White v. Barnard*, 29 F. 2d 510 (1st Cir. 1928).

The Referee found that Appellees were in actual possession of the west one-half of the Katella property on the date they filed their Chapter XI petition [Cl.

¹⁵The authorities cited by Appellants in support of their contention that the bankruptcy court can never acquire jurisdiction over real property when record title is in a stranger (App. Op. Br. pp. 11-12) are either not in point or simply contrary to well-established doctrines of summary jurisdiction. The quotation from Collier On Bankruptcy that "a record owner of real property not a party to the bankruptcy proceedings, cannot be brought within the bankruptcy court's jurisdiction" is from a footnote to the following statement in the text (2 Collier, On Bankruptcy, ¶23.06[1], p. 494 (14th ed. 1964)): "The question 'who are adverse claimants' becomes one of primary importance *where the property is in the possession of other than the bankrupts*" (Emphasis supplied). *Wight v. Street*, 63 F. 2d 80 (9th Cir. 1933), *Kaplan v. Guttman*, 217 F. 2d 481, 484 (9th Cir. 1954), and *In re Graceland*, 73 F. Supp. 158 (S.D. Cal. 1947) were all cases in which the court held that neither the trustee in bankruptcy nor the bankrupt were in actual possession of the real property. *In re Blackbear Products Co.*, 56 F. 2d 243 (W.D. Wash. 1931) and *In re Mimms & Parham*, 193 Fed. 276 (W.D. Ky. 1912) are simply two district court cases which are against the great weight of authority, and *Mimms & Parham, supra*, has been characterized as "at variance with the established doctrines placing great stress on the test of possession in bankruptcy court through its officer rather than legal" possession through title. 2 Collier On Bankruptcy, ¶24.05[2] p. 374, n. 10. (14th ed. 1966).

Tr. 109, 114]. The district court held this finding of fact was “not clearly erroneous” [Cl. Tr. 151-152].

The determination of who is in actual possession is a question for the trier of fact. *In re Christ's Church of The Golden Rule*, 79 F. Supp. 46, 47 (N.D. Cal. 1948); *Bullock v. Rouse*, 81 Cal. 590, 596, 22 Pac. 919, 920 (1889); *Clay v. Saute*, 140 Cal. App. 2d 681, 295 P. 2d 914 (1956). And an appellate court will not reverse these findings unless they are “clearly erroneous”. General Order in Bankruptcy No. 47; Fed. R. Civ. P., 52(a).

Appellees clearly were in actual possession of the entire Katella property prior to the transfer to Kapelus and Crenshaw on September 23, 1963. The Katella property was an orange grove when Appellees purchased it in 1961 [Cl. Tr. 99-100] and Appellees cultivated the property and sold the orange crop [R. Tr. 392-393]. In April, 1963, Appellees cleared part of the orange grove [R. Tr. 393-395] in preparation for building a motel or apartment on the property [R. Tr. 414-415, 1282]. Lenders periodically were taken on the property to obtain refinancing [R. Tr. 382-384, 446-447]. There is no dispute over this proof, and, in fact, Appellants actually stipulated in the state court action that Appellees “were the owners and in exclusive possession of the subject real property on or about September 23, 1963” [Cl. Tr. 10].

Appellants dispute the fact that Appellees were in possession of the west one-half of the Katella property after the record conveyance to Appellants on September 23, 1963.¹⁶ Appellants rely solely upon Kapelus' testi-

¹⁶Appellants argue (App. Op. Br. p. 13) that because the Katella property was unimproved and uninhabited it was “not
(This footnote is continued on the next page)

mony that he made payments to the holder of the first deed of trust, authorized potential purchasers to go on the property, and attended city council planning commission hearings (App. Op. Br. p. 17). Appellees likewise pointed to their payments to the holder of the first deed of trust [R. Tr. 324, 345-346] and their taking potential purchasers on the property [R. Tr. 416, 809]. But, in addition, Appellees proved they paid all taxes on the west one-half of the property for the entire tax year 1963-1964 [R. Tr. 901], and never intended to surrender possession [R. Tr. 398, 833-834].

The Referee was required to resolve this conflict in the evidence. *In re Christ's Church of the Golden Rule*, 79 F. Supp. 42 (N.D. Cal. 1948). He did so and he found that Appellees remained in actual possession of the property after the execution of the deed and were in actual possession of the property when the Chapter XI proceedings were filed [Cl. Tr. 109, 114].

There was ample evidence to support the Referee's finding that Appellees remained in actual possession of the west one-half of the Katella property after September 23, 1963.¹⁷ After the conveyance to Kapelus

susceptible to actual physical possession". But appellants stipulated in the state court action that Appellees "were the owners and in exclusive possession of the subject real property on September 23, 1963" [Cl. Tr. 10]. Moreover, the California law is clear that the kind and extent of the evidence necessary to sustain a finding of actual possession depends upon the "use appropriate to the location and character of the property, each case resting upon its own peculiar facts." *Posey v. Bay Point Realty Co.*, 214 Cal. 708, 712, 7 P. 2d 1020 (1932). See, *Clay v. Saute*, 140 Cal. App. 2d 681, 295 P. 2d 914 (1956); *Goodrich v. Mortimer*, 44 Cal. App. 576, 186 Pac. 844 (1919).

¹⁷It is clear Appellees remained in actual possession of the east one-half of the property as well. Appellees continued to store trash cans from their motels on the east one-half until February, 1964 [R. Tr. 399], and they kept motel signs and flags on the property [R. Tr. 402].

and Crenshaw, Appellees and their agents physically set foot on the property to show it to prospective lenders [R. Tr. 404, 416, 809, 1791] and authorized lenders, engineers and appraisers to go on the property [R. Tr. 416, 809]. After the conveyance to Appellants, Appellees physically set foot on the west one-half of the property and removed an advertising sign of the Samoa Motel [R. Tr. 402-403] and caused Melodyland Theatre to take down one of its signs on the property [R. Tr. 404]. After the conveyance to Appellants, the City of Anaheim removed orange trees from the west one-half of the property and in February, 1964, sent Appellees a bill for \$2,587 for the removal [D-62]. In October or November, 1963, Appellees discovered that two or three feet of water had gathered on the property and was attracting children. Although Appellees instructed their agent, Reedy, to call their grading contractor, Mr. Main, to correct the level of the property previously excavated by him, no work was done [R. Tr. 806-808]. After the deed, Appellees paid \$1,387 in cash to the holder of the first deed of trust on the west one-half of the Katella property [R. Tr. 324, D-44] and on October 12, 1963 Appellees made another payment of about \$1,700 [R. Tr. 345-346]. In February, 1964, after Kapelus had refused the tender under the option agreement, Appellees paid, with cash, all taxes on the west one-half of the Katella property for the entire tax year 1963-1964 [R. Tr. 901]. In May of 1964 Appellees entered into an escrow to sell the west one-half of the Katella property. The escrow instructions that were drawn authorized soil tests on the property [D-64] and Kapelus knew it [R. Tr. 1484]. And finally, as a condition for getting a conditional use per-

mit from the City of Anaheim, the City wrote Appellees, in September, 1964 (after the Chapter XI proceedings were filed) that Appellees [D-117] would have to pay a street lighting assessment for the entire Katella property [D-117; R. Tr. 1490].¹⁸ Kapelus knew of this assessment against Appellees when it was made, and he knew it covered both the west and east halves of the Katella property [R. Tr. 1488-1491].

Just as probative as the physical acts of possession was the clear intention of the parties that Appellees were to remain in possession after the execution of the deed. Appellees and Kapelus had been involved in complex real property transactions for over a year before the conveyance to Appellants, and in none of the transactions had Appellees ever surrendered possession to Appellants. On July 31, 1963, Appellants (as beneficiaries) bid in Lot 8 at foreclosure sale [Cl. Tr. 96-97]. Nevertheless, Appellees remained in actual possession of Lot 8 after the transfer to Appellants and continued to collect the rents on the apartment building [Cl. Tr. 99; R. Tr. 78-79, 286]. When it came to the Katella transaction, it was Appellees' intention never to surrender possession, and they were not asked to surrender possession [R. Tr. 62, 363, 398, 833-834]. As a result, the Referee found that it was the mutual intention of both parties that Appellees were to remain in possession of the west one-half of the Katella property following the deed to Appellants [Cl. Tr. 109].

The Referee was justified in his view that, although the evidence was conflicting, “. . . it is a clear prepon-

¹⁸The bill from the City of Anaheim assessed 336 front feet [D-117]. This was the front footage of both the west and east halves of the Katella property [R. Tr. 1490].

derance in favor of the debtors in actual possession”¹⁹ [R. Tr. 1919]. Certainly part of the Referee’s task was to weigh the credibility of the witnesses. The Referee considered the conflicting evidence, and since the credibility of witnesses is involved, the Referee’s finding of actual possession should not be disturbed on appeal. *Jue v. Bass*, 299 F. 2d 374 (9th Cir. 1962). And this is especially true when the Referee’s findings of fact have been also affirmed by the district court on review. *Minella v. Phillips*, 245 F. 2d 687 (5th Cir. 1957); *Arnold v. King*, 236 F. 2d 877 (9th Cir. 1956); *Monson v. Hibler*, 24 F. 2d 909 (9th Cir. 1928).

B. Appellants’ Claim of Ownership Was Merely Colorable and They Were Not Bona Fide Adverse Claimants.

Actual possession is not the only basis for invoking the summary jurisdiction of the bankruptcy court. Even if third parties are in possession of the bankrupt’s property, the court has jurisdiction over it under the doctrine of constructive possession if the adverse claim of the third party is no more than colorable. *Harrison v. Chamberlin*, 271 U.S. 191, 46 S. Ct. 467 (1926), reaffirmed by the court in *Cline v. Kaplan*, 323 U.S. 97, 65 S. Ct. 155 (1944). Since the mere assertion of an adverse claim does not oust the bankruptcy court of jurisdiction, *May v. Henderson*, 268 U.S. 111, 45 S. Ct. 456 (1925), the bankruptcy court should “enter upon

¹⁹Thus Appellees carried their burden of proving they were in actual possession of the west one-half of the Katella property, and overcame any contrary presumption that might be raised by Section 321 of the California Code of Civil Procedure. Although Appellants stress this statute (App. Op. Br. p. 14) they fail to point out that it deals with acquiring title by adverse possession, and, moreover, a party can invoke the statute only after first “. . . establishing a legal title to the property. . . .” Cal. Code of Civ. Proc., §321.

a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable.” *Harrison v. Chamberlin*, *supra*, 271 U.S. at 194, 46 S. Ct. at 468.

The standard for determining whether the adverse claim is substantial was succinctly stated in *Harrison v. Chamberlin*, *supra*, 271 U.S. at 195, 46 S. Ct. at 469:

“ . . . we are of opinion that it is to be deemed of a substantial character when the claimant’s contention ‘discloses a contested matter of right, involving some fair doubt and reasonable room for controversy’ . . . in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense.”

The mere assertion of an adverse claim by a stranger in possession is not enough to defeat the bankruptcy court’s jurisdiction. The adverse claimant must make some showing as to the bona fides of his claim.

“Of course he need not prove the basis for his claim to the point where he obtains a favorable adjudication of it. But he certainly must go far enough to show, first, that there is an arguable factual basis for the claim, and, second, that on such factual basis there is some plausible ground for thinking that the law will afford redress.” *American Mannex Corporation v. Huffstutler*, 329 F. 2d 449, 454 (5th Cir. 1964).

When the adverse claimant fails to demonstrate both an arguable factual basis for his claim and some plausible ground for believing the law will grant redress, the status of his claim does not advance beyond the merely colorable level. *Kyle v. Stewart*, 360 F. 2d 753 (5th Cir. 1966).

The Referee evaluated the adverse claim of Appellees and he concluded it was merely colorable. On evidence that he found to be “unequivocal, clear and convincing,” the Referee found that the deed and option to purchase “were nothing more than a disguised security transaction and a mortgage” and Appellants’ claim that it was not “has no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary” [Cl. Tr. 116]. With respect to Appellants’ claim that the option was not properly exercised, the Referee found, again on evidence that was “unequivocal, clear and convincing”, that the claim “has no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary” [Cl. Tr. 116].

These findings, affirmed by the district court, are not clearly erroneous. No trier of fact in any jurisdiction, whether court or jury, could reach any other conclusion but that the deed and option constituted a security transaction, the form of which Kapelus dictated. Kapelus’ testimony certainly could not elevate Appellants to the dignity of substantial adverse claimants. Indeed, many courts have echoed Judge Clark’s view that the bankruptcy court’s jurisdiction cannot be defeated by “the claimant’s own testimony alone, when it is disbelieved by the Referee.” *Matter of Meiselman*, 105 F. 2d 995 (2d Cir. 1939). See *Sahn v. Pagano*,

302 F. 2d 629 (2nd Cir. 1962); *Shaw v. Thompson*, 184 F. 2d 572 (5th Cir. 1950).

Appellants incorrectly suggest (App. Op. Br. p. 10) that this Circuit, in *Suhl v. Bumb*, 348 F. 2d 869 (9th Cir. 1965), adopted a different rule with respect to the bankruptcy court's duty to determine the substantiality of an adverse claim. Appellees do not question the correctness of that decision. *Suhl* correctly rejects constructive possession as a basis of summary jurisdiction "where the property in question is a money claim against third parties rather than a physical asset alleged to be part of the bankrupt's estate." *Suhl v. Bumb*, *supra*, 348 F. 2d at 782. But *Suhl* expressly recognizes that where the subject of the bankruptcy court's jurisdiction is a physical piece of property—the Katella property—and not an *in personam* action for a money judgment (like in *Suhl*)—summary jurisdiction is proper. *Soverio v. Franklin National Bank of Long Island*, 328 F. 2d 446 (2nd Cir. 1964); *Lindsay-Robinson & Company v. Grady*, 282 F. 2d 607 (4th Cir. 1960); *In re Rock Springs Water Co.*, 140 F. 2d 566 (3rd Cir. 1944); *Head v. Brainard*, 5 F. 2d 289 (9th Cir. 1925).

C. Appellees' Ownership of the Katella Property Serves as a Sufficient Jurisdictional Basis in Chapter XI Proceedings.

The Bankruptcy Act grants the bankruptcy court broader jurisdiction in Chapter XI proceedings than in straight bankruptcies. Section 311 of the Act provides:

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purpose of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

While actual or constructive possession is necessary for jurisdiction in straight bankruptcy, in Chapter XI proceedings “*either ownership in the debtor at [the time the] petition is filed, or possession of the court is a basis for summary jurisdiction over controversies*” (Emphasis supplied). 8 Collier On Bankruptcy, ¶3.02, p. 181 (14th ed. 1966).

The facts of this case satisfy this ownership requirement in two ways: First, because—as found by the Referee and affirmed by the district court—the deed was in fact a mortgage. Second, having exercised the option before these proceedings began, Appellees became the equitable owners, leaving Appellants with only bare legal title to secure the purchase price. *Elliot v. McCombs*, 17 Cal. 2d 23, 109 P. 2d 329 (1941); *Estate of Dwyer*, 159 Cal. 664, 115 Pac. 235 (1911).

III.

The Referee Gave Appellants Ample Opportunity to Present Their Evidence on Jurisdiction and on the Merits.

Although Appellants do not complain of a single evidentiary ruling, nevertheless, throughout their brief they intimate there was something unfair about the way the case was tried. Appellants, in their brief, complain about the courtroom facilities (p. 19), the lack of a clerk (p. 20), the order of proof (pp. 9-10), and the Referee's refusal to advise Appellants' counsel “what factual issues the Referee thought needed to be determined” (p. 28).

The issue of summary jurisdiction was fairly tried and Appellants were afforded every opportunity to present their evidence. Appellants' trial tactics were to in-

roduce the deed, the estoppel statement, and brief testimony from Kapelus, and then demand that the Referee rule on summary jurisdiction because of Appellants' contention that no one could have actual possession of the Katella property. Although the Referee was prepared to rule on summary jurisdiction the fourth day of trial, he preferred to hear further evidence [R. Tr. 413, 414]. Counsel complied with the Referee's suggestion and by Wednesday, January 6, 1965, Appellees were prepared to rest on the jurisdictional question [R. Tr. 1404]. Appellant's counsel then advised that he had "one additional question" for Kapelus on rebuttal and would then be ready to have the jurisdiction issue decided [R. Tr. 1404-1405]. The Referee then asked counsel to argue summary jurisdiction on Tuesday, January 12th, and advised Appellants that: "You can then elect your next procedure as far as putting on additional evidence, if we find it necessary to go forward and hear your side of the case on the merits." Appellants' counsel responded: "I think I understand how Your Honor intends to proceed" [R. Tr. 1406]. The following day, Thursday, Appellants' counsel produced Kapelus in rebuttal on the jurisdictional question [R. Tr. 1479]. The Referee then asked if Appellants were "prepared to put on more evidence" on the jurisdiction issue [R. Tr. 1499]. Appellants stated they had no further evidence on jurisdiction [R. Tr. 1500-1502].

In light of the record it is difficult to see how Appellants can even make the argument that "they were prevented from submitting evidence on the case in chief" (App. Op. Br. p. 27). At the conclusion of the argument on summary jurisdiction the Referee asked Appellants if they were prepared to proceed on the merits

[R. Tr. 1705-1706]. Appellants' counsel had previously advised the court that they had substantial evidence to produce on the merits and had stated to the court [R. Tr. 1502-1503]:

“ . . . if we were to litigate the matter on its merits then of course there are probably a great number of witnesses we would want to call. . . . There I am thinking of the escrow company appraiser, people from the Independent Bank, trust deed holders who have dealt with Mr. Franklin, we are thinking of a great amount of evidence on the issues in chief that we would want to get into our case.”

Appellants' counsel then asked for a week's continuance in the trial, to Monday, January 18 [R. Tr. 1705-1706, 1710], so that he could prepare his case on the merits. But on Monday, January 18, 1965 [R. Tr. 1712] Appellants were *not ready* and suggested that they thought Appellees should first go forward and present Appellees' evidence on the fraudulent conveyance issue [R. Tr. 1713, 1714, 1717]. Appellees and the Referee accommodated, and when Appellees concluded their proof, the Referee again asked Appellants to proceed with their proof [R. Tr. 1832]. Appellants again declined “to submit any other evidence” [R. Tr. 1832], although the Referee reminded Appellants' counsel [R. Tr. 1833]:

“We certainly did not intend to foreclose any other evidence that you wish to present.

“As a matter of fact we asked for it many, many times. We mentioned at the last hearing that you might bring in an appraiser and the title people and a host of others.”

IV.

The Bankruptcy Court Did Not Abuse Its Discretion in Refusing to Surrender Its Jurisdiction to the State Court.

The limited instances in which the bankruptcy court should surrender its exclusive jurisdiction over the affairs and property of the bankrupt are well defined. When the decision before the bankruptcy court requires the application of state rules of law that are uncertain and not settled, the parties should repair to the state court so that rights in local property are not determined "by the accident of federal jurisdiction." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 484, 60 S. Ct. 628, 631 (1940). Accordingly, when the decision of the bankruptcy court depends upon resolving an unsettled question of state property law, the bankruptcy court should surrender its jurisdiction to the state court. *First National Bank of White River Jct. v. Reed*, 306 F. 2d 481 (2d Cir. 1962). But when the state law is well settled and free of uncertainty, then it is improper for the bankruptcy court to refer the controversy to the state court. *Marian Corp. v. Bray*, 235 F. 2d 318 (4th Cir. 1956); *In re Fine Arts Corp.*, 136 F. 2d 28 (6th Cir. 1943); *In re J. Rosen & Sons, Inc.*, 130 F. 2d 81 (3rd Cir. 1942); *In re Chicago and N.W.R. Co.*, 127 F. 2d 1001 (7th Cir. 1942). See, 1 Collier, On Bankruptcy, ¶2.07, pp. 162-163 (14th ed. 1966).

Tested by these standards it is clear the Referee did not abuse his discretion in refusing to surrender jurisdiction. There are no unsettled questions of California law involved. Appellees sought recovery on three alternative grounds: The deed to Appellants was in fact a mortgage; the option was properly exercised; and, the

transfer was voidable as a fraudulent transfer under the Bankruptcy Act. The law has been clear in California for almost a century that a deed can always be proved to be in fact a mortgage. Cal. Civ. Code, §§2924, 2925. The California Courts have uniformly held that “. . . every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form . . . in which the transaction is clothed . . .”. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 21, 147 P. 2d 583, 594 (1944); *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816 (1896); *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410 (1886). California law clearly recognizes the validity of options. *Elliott v. McCombs*, 17 Cal.2d 23, 109 P.2d 329 (1941). And Appellees’ fraudulent transfer cause of action is simply based upon the Bankruptcy Act.

The only issues on the merits before the Referee were factual ones: Was it the intention of the parties that the deed was a mortgage; did Appellees comply with the terms of the option; and was the property transferred to Appellants for less than fair consideration at a time when Appellees were insolvent? These are not issues involving such “unsettled questions of state property law”, as to require the bankruptcy court to surrender its “exclusive and non-delegable control over the administration of an estate in its possession.” *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 484, 60 S. Ct. 628, 630 (1940).

Appellants seem to argue that every controversy involving title to real property should be referred to the state courts for decision and “that the Federal Courts have plainly announced their policy in this regard” (App. Op. Br. pp. 20-23). But the authorities Appellants cite

simply do not support their position. *Thompson v. Magnolia Petroleum*, *supra*, ordered the controversy resolved in the Illinois courts because the Illinois courts themselves had not determined whether a railroad right of way was an easement or ownership of the fee simple. *Martoff v. Elliott*, 326 F.2d 205 (9th Cir. 1963); *Jackson v. Sports Company of Texas, Inc.*, 278 F.2d 716 (5th Cir. 1960); *Kaplan v. Guttman*, 217 F.2d 481 (9th Cir. 1954); and *In re Graceland*, 73 F.Supp. (S.D. Cal. 1947), all dealt with whether there was summary jurisdiction at all, and not with surrender of jurisdiction under the *Thompson v. Magnolia Petroleum* doctrine. And *Palmer v. Travelers Ins. Co.*, 319 F.2d 296 (5th Cir. 1963) involved an *in personam* action for negligence over which the bankruptcy court clearly had no jurisdiction. Not one of these cases holds, or even suggests, that the bankruptcy court has no jurisdiction to determine title to real property. And for good reason, for *Thompson v. Magnolia Petroleum* expressly holds (309 U.S. at 482, 60 S.Ct. at 630) that "... possession of those lands under claim of fee-simple ownership by the railroad and later by the trustee was an adequate basis for the District Court's summary jurisdiction."

Finally, Appellants assert that it would be "grossly unfair" to deprive them of their alleged right to a jury trial on the primary factual issue in the case—the intent of the parties (App. Op. Br. p. 19). However, Appellants previously waived their right to a jury trial on this issue in the state court action [Cl. Tr. 11, 18, 69].²⁰ Moreover, an action to declare a deed a mort-

²⁰The joint pre-trial statement in the Superior Court action provided that "Jury is Waived" [Cl. Tr. 11] and the pre-

gage is an equitable action in which there is no right at all to a jury trial. *Duda v. Sterling Mfg. Co.*, 178 F.2d 428 (8th Cir. 1949); *Harlan v. Sparks*, 125 F.2d 502 (10th Cir. 1942); *Clyne v. Brock*, 82 Cal. App. 2d 958, 188 P.2d 263 (1947); *Santa Ana Mortgage & Investment Co. v. Kinslow*, 30 Cal. App. 2d 107, 85 P.2d 899 (1938).

V.

The Relief Sought by Appellees Is for the Benefit of Their Creditors and Is Not Barred by Any Equitable Principles.

To permit Appellants to prevail because of the Appellees' alleged misconduct would be to completely ignore that this litigation is being conducted for the benefit of Appellees' creditors. Appellees are seeking to quiet title to the property in their capacity as "debtors-in-possession" under Chapter XI of the Bankruptcy Act. Section 342 of the Act specifically provides that "[w]here no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act . . ." (Emphasis added). For all practical purposes, the debtor-in-possession is the trustee in bankruptcy. *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 83 (2nd Cir. 1940); *Central Hanover Bank & Trust Co. v. President and Directors of Manhattan Co.*, 105 F. 2d 130 (2nd Cir. 1939); *In re Walker*, 93 F. 2d 281 (2nd Cir. 1937). Whereas in a straight bankruptcy it is the trustee who quiets title to

trial order set the matter for trial as a "non-jury trial" [Cl. Tr. 18, 69]. Under California law, the entry of a pre-trial order setting a case for non-jury trial constitutes a waiver of a party's right to a jury trial. *Gorden v. Reynolds*, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960).

property, and recovers fraudulent transfers, in Chapter XI proceedings it is the debtor (when no receiver or trustee is appointed) who brings those actions. It was not Congress' intent in enacting Section 342 to create a nullity—to grant the debtor-in-possession the power to protect his creditors and then to bar creditors from relief because of the debtor's misconduct. To so construe the Bankruptcy Act would mean that Kapelus and Crenshaw would reap a windfall of more than \$300,000 while Appellees creditors would suffer an equivalent loss. Indeed, courts of equity have clearly recognized the creditors' interest by permitting an insolvent debtor to set aside fraudulent transfers. Relief is not given out of consideration for the debtor, but for the purpose of protecting his creditors. 2 Pomeroy, Equity Jurisprudence 137, n. 17 (5th ed. 1941).

Furthermore, Appellants failed to demonstrate that they themselves were adversely affected by Appellees' alleged misconduct and this alone is fatal to their "unclean hands" defense. Although Appellants stress Appellees' past conduct, at no point do Appellants demonstrate that *they* were harmed. Pomeroy states:

"The party to a suit, complaining that his opponent is in court with unclean hands . . . must show that he himself has been injured by such conduct, to justify the application of the principle to the case. The wrong must have been done to the defendant himself, and not to some third party." 2 Pomeroy, Equity Jurisprudence 99 (5th ed., 1941). Cf., *In re Euclid Doan Co.*, 104 F. 2d 712 (6th Cir. 1939).

Conclusion.

For the foregoing reasons, the order of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

J. RONALD TROST

APPENDICES.

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APPENDIX A

Kapelus Denies Any Participation in Loan Escrow No. 6363RB or Negotiations Looking Toward a Security Transaction on the Katella Property.

Kapelus testified that there was no new security agreement with Appellees after the trustee's sale of Lot 8. Thus he was compelled to claim: That during August, 1963 there was no security agreement looking to a note and deed of trust; that he did not give any instructions in this connection to Broussard (the escrow officer); that he did not discuss the subject with Broussard; that he threw the August 26, 1963 escrow instructions from Broussard in the wastebasket; that he did not draw the August 15 quitclaim deed to Lot 8; that the deed must have been delivered to him from someone else; and that the memorandum (D-87) in his handwriting related to some other transaction.

Kapelus, to extricate himself from involvement in loan escrow No. 6363RB, which contained promissory notes for various amounts and variously dated deeds of trust, testified [R. Tr. 1044-1046]:

"Q. When you received the escrow instructions . . . you testified you looked at them and immediately threw them in the wastepaper basket? A. Yes.

Q. I believe you also testified that you had nothing further to do with that proposed escrow from that time forward; is that correct? A. That is right.

Q. Is that your testimony today? A. That is my testimony. Wait a minute, I think that if I may expound a little.

Q. Surely. A. I think that at the time we were at United Title Company on the 12th of September I think that Bob Broussard indicated that he wanted something signed to close out the other escrow.

Q. This was on the 12th? A. Yes. . . .

A. I believe that I told him at that time we had not been a party to the escrow so there was nothing for us to sign.

Q. Did you sign anything? A. No.

Q. You didn't sign anything to close out the —
A. No. We had not been a party to the escrow so there was no necessity to sign any documents for the purpose of closing it out.

Q. Did you sign any documents at all in connection with that proposed escrow? A. No.

Q. Either on behalf of yourself or Crenshaw Carpet Center? A. No, not that I recall."

He was *promptly* impeached [R. Tr. 1046]:

"Q. I will show you Debtors' 37 and ask you if that is your signature, Mr. Kapelus? A. That is my signature.

Q. What does that document say basically? A. 'Authorize and directed to cancel the above numbered escrow upon execution of these instructions by all parties concerned in said escrow.'

Q. You are authorizing United Title to cancel another escrow.

What is the number of that other escrow? A. 6363RB.

Q. Is that the one we have been referring to as the loan transaction? A. I don't know. If I can see it.

Q. I will show it to you.

In other words you did sign that paper in that escrow? A. Apparently I did."

And he was wrong about the date. He signed the cancellation instructions in the loan escrow 6363RB on September 23, not September 12 [R. Tr. 1047].

It was Appellees' contention that Kapelus tentatively agreed to the terms of the escrow instructions at United Title in their No. 6363RB dated August 26, 1963 (D-34) and that thereafter Kapelus alone changed the terms and dictated instructions to Broussard resulting in the amendments and instruments prepared by Broussard dated August 28, August 29 and September 3.

If Kapelus dictated these increasingly onerous terms, the circumstances would directly involve him in a security transaction rather than a sale or exchange. He denied participation [R. Tr. 1001]:

"Q. Do you recall testifying that you never gave any instructions to Mr. Broussard at United Title to draw any papers in connection with that escrow? A. That is correct."

Again, Kapelus testified [R. Tr. 1009-1010]:

"Q. Did you ever call subsequent to the approximate date of August 26 Bob Broussard at United or anyone else at United and instruct him to prepare an amendment to the escrow instructions? A. No. I don't believe I did, no.

Q. You did not? A. Wait a minute. Amendment to these instructions?

Q. Yes. A. No."

Reedy promptly impeached Kapelus [R. Tr. 1251-1254]:

“Q. Mr. Reedy, I want to show you Debtors’ Exhibit number 92 which appears to be an instruction or amendment to instructions bearing 8-28-63 which provides that the amount of note and deed of trust shall be \$20,500.

My question to you is, did you ever instruct the escrow on or about August 28, 1963, to change the amount of the note from \$15,000 to \$20,500? A. No, sir.

Q. Did you give any such instruction at any other time in connection with that matter? A. No, sir.

Q. I will show you Debtors’ Exhibit 93 which appears to be an amendment to escrow instructions bearing date 8-29-63. I will ask you if on or about that date you gave any instructions into the escrow changing the rate of interest to 10 percent per annum? A. No, sir.

Q. Or did you on any other date? A. No, sir.

Q. With reference to the same exhibit did you on or about that date give any instruction to the escrow that borrower furnish lender an ATA policy of title insurance of Western Title Insurance Company? A. No, sir.

Q. Or any instruction in substance to that effect? A. No, sir.

Q. Or at any time? A. No, sir.

Q. I will ask you further with the same exhibit.

Did you on or about that date give any instructions to the escrow that as an agreement between

buyer and seller herein for which you as escrow holder are to have no liability or responsibility; buyer agrees that seller is to receive the August rents on building on lot 8 of tract 3535? A. No, sir.

Q. Or in substance to that effect? A. No, sir.

Q. Or on any other date? A. No, sir.

Q. Now I will show you Debtors' Exhibit 89 which appears to bear date 9-3-63 and ask you concerning item 3.

Did you on or about September 3, 1963, instruct the escrow with regards to rents as follows:

'Buyer agrees to deposit in escrow the amount of rents collected for the month of August on lot 8 of tract number 3535. Said amount to be credited to sellers'? A. No, sir.

Q. Or in substance to that effect? A. No, sir.

Q. Or at any time? A. No, sir.

Q. Did you at any time authorize any other person to give any such instructions as the ones we have discussed? A. No, sir."

And Kapelus was impeached to the same effect by Franklin who testified that he did not give any of the instructions dated August 28, or August 29, or September 3 [R. Tr. 1461-1463].

The most damaging impeachment came from a memorandum (D-87) off a desk pad. Notes in Kapelus' own hand, set out on page 21, Appellees' Brief, *infra*, conclusively demonstrate it was Kapelus' idea:

- (1) To increase the amount of the deed of trust note to \$20,500 from \$15,000;

- (2) To increase the interest rate from 8% to 10% ;
- (3) To require the title company to furnish an ATA policy ;
- (4) To require the payment of the August, 1963 rents from the apartments on Lot 8.

These notes came to Broussard's escrow at the title company by design and not by accident. The figures "60,722.90" and "20,500.00" and "81,272.90" written on the memorandum were in escrow officer Broussard's handwriting and Broussard testified that instructions given to him for the preparation of instruments he drew in escrow No. 6363RB came from some party to the escrow. Broussard testified [R. Tr. 1128] :

"Q. I will show you Debtors' 87 which is a memorandum slip with the printed name 'Marvin B. Kapelus' on the top bearing certain penned notations and advise you that this was among the documents here. . . .

. . .

Q. You will observe the handwriting on it?

A. Yes.

Q. Can you tell me whose figures they are?

A. Those are my figures.

Q. In other words, the figures 60,772.90 is your writing? A. Yes.

Q. And the figure under that? A. \$20,500.

Q. That is your writing? A. Yes.

Q. The line is your writing? A. Yes.

Q. And what appears to be the total \$80,272.90 is your writing? A. Yes.

. . .

Q. . . . Does the figure 10 percent interest, the first line on that Exhibit Debtors' 87 have any significance to you or refresh you as to the occasion for changing the terms of the \$20,500 note from 8 percent interest to 10 percent interest? A. I don't recall the occasion for changing other than I know I was instructed by someone to change."

That someone had to be Kapelus, who testified [R. Tr. 1056-1058]:

"Q. Do you have any recollection of making a note [referring to D-87] of that kind and handing it to Mr. Broussard? A. No, unless he was in my office which he has never been.

Q. Do you have any way of knowing how that got into Mr. Broussard's office? A. Not at all unless it fell out of another file and out of my briefcase.

Q. Could it have been handed to him by you?

A. No.

Q. Could it have been left in his office by you?

A. As I say, it might have fallen out of my—may I explain how I arrive at this conclusion?

Q. Yes.

. . .

A. I don't know what this was in regard to.

Q. You don't know if that was even in regard to a Franklin matter? A. No. It could have been any one of a dozen things I have handled. The fact that there is something regarding an ATA extended coverage policy would indicate that it was a loan transaction. ATA policy being applicable to loan transactions.

I was probably representing a lender unless—I frankly don't know what it was in regard to. The lender may have asked for an ATA.

Q. Do you notice the figure \$20,500? A. As I say it is not my handwriting.

Q. I asked you if you notice the figure \$20,500? A. It could be \$20,500 or \$20,506. What purports to be a zero isn't completed, so I don't know."

APPENDIX B

Kapelus Denies Drawing Quitclaim Deed to Lot 8, August 15, 1963.

Appellees contended that two weeks after trustee's sale, July 31, Kapelus agreed that Crenshaw would re-convey title to Lot 8 in exchange for a new trust deed securing the debt. Appellees contended that the deed dated August 15, 1963, from Crenshaw on Lot 8 and the August 26, 1963, "wastebasket" escrow instructions evidenced such agreement. Kapelus denied anything to do with Appellees during August, 1963, concerning a proposed new note and deed of trust, and denied he drew the August 15, 1963 deed. Kapelus testified [R. Tr. 1006-1007]:

"Q. I will show you Debtors' 31 which is a corporation quitclaim deed to lot 8.

Was that prepared in your office? A. I don't believe so.

Q. Do you know when it was prepared? A. No, I don't. The reason that I don't believe so is in the body the name of my client is incorrect."

...

Q. Have you ever used Land Title Insurance Company forms? A. Yes. I have used all the title company forms.

Q. You don't recall directing anyone to prepare this? A. No.

Q. I will show you— A. What is the date of that?

Q. August 15.

You are referring to the quitclaim deed? A. Yes. I think as of that date we replaced all of our Land Title forms with Security Title forms."

And he later continued [R. Tr. 1048-1049]:

“Q. Do you have any recollection at all today about this document? A. Only recollection I have of this document is that I had it in my possession. I believe it was delivered to me with the escrow, some of the other escrow documents regarding the trade of Katella.

Q. You delivered that? A. I delivered this to Barnett for signature or to the Barnetts.

Q. You delivered it to Mr. Broussard at United, did you not? A. Yes. I believe I brought it back.”

Kapelus was forthwith impeached by his June, 1964, deposition testimony [R. Tr. 1049-1050]:

“Q. Do you recall what your recollection was about this when you testified on June 23 at your deposition? A. No, I don’t.

Q. Well, at page 34 of the deposition—are there any changes in the copy of the deposition that you have? Is that the corrected copy, Mr. Kapelus? A. No.

Q. On June 23 did you not testify with respect to this document which was dated August 15: ‘A. The quitclaim deed to lot 8, I believe, was either given to me on the—I may have prepared it. I think I prepared the quitclaim deed myself, and I think I had that sent in with the option after the escrow instructions were signed. I don’t have a transmittal in this file. It would be in the lot 8 file.’

Q. Is that testimony in error? A. No, it is not in error. I think it was an *equivocal statement*.” (Emphasis supplied.)

Appellees' counsel then sought to discover who had been legal secretary to attorney Kapelus on August 15, 1963 [R. Tr. 1050]:

“Q. Who was your secretary on August 15, 1963? A. Probably—wait a minute, give me the date.

Q. August 15, 1963. A. I couldn't tell you.

Q. Was it Sandra Lerner? A. Yes.

...

Q. Was Sandra Lerner a Notary Public? A. Yes.

Q. Did Sandra Lerner notarize the signatures of Al Barnett and Beverly Barnett on the quitclaim deed on August 15? A. Yes. I believe she accompanied me to their home on that Sunday.”

Appellees then produced Sandra Lerner and Kapelus' partner Barnett, each of whom demolished Kapelus' testimony concerning the preparation of the deed [R. Tr. 1191]:

SANDRA LERNER:

“Q. Did you prepare the August 15, 1963, corporation quitclaim deed? A. I think so.”

ALBERT BARNETT [R. Tr. 1436]:

“Q. Mr. Barnett, I will hand you Debtors' 31 and ask you if you have ever seen that document before? A. Yes, I signed it so obviously I have.

Q. Do you recall signing that document? A. Yes.

Q. Do you recall your wife signing that document? A. Yes.

...

Q. Do you know who handed you that document to sign? A. I presume it was Mr. Kapelus.

Q. What is the date that you signed that, Mr. Barnett? A. August 15, 1964, or—wait a minute. Yes.”

And Broussard testified he did not prepare the deed [R. Tr. 1154]:

“Q. I will show you Debtors’ Exhibit 31 and ask you specifically if you drew that instrument?
A. No, we did not.”

APPENDIX C

Kapelus Claims Reporter's Transcript Was Full of Errors.

Early in the trial there appeared numerous and substantial contradictions between Kapelus' testimony at trial and his earlier statements in his State court deposition conducted on June 23, 1964. Kapelus blamed the deposition reporter, John R. Davis [R. Tr. 1091]:

"There has been so many errors in this deposition that I don't know whether I testified verbatim as such or not."

This time it was the court reporter who impeached Kapelus [R. Tr. 1018]:

"Q. After you were subpoenaed did you examine the transcript? A. Yes, sir, I did.

Q. And make some examination of your notes? A. I read through my notes. Yes, sir.

Q. Is that transcript before you a true and correct verbatim transcription of all that was said at that deposition hearing? A. Yes, sir, to the best of my knowledge it is."

Nevertheless, Kapelus persisted in contending that the deposition was incorrectly transcribed [R. Tr. 681]:

"Q. BY MR. TROST: In other words, so that I understand this, that the date of the 17th in your deposition on page 31 was wrong? A. That is correct.

Q. It was the 23rd? A. There are numerous changes made in that deposition. The reporter that took that interlineated. There are typographical errors and the deposition was not signed as originally taken."

Kapelus attempted to corroborate his contention of erroneous reporting by stating he had made corrections in the *original deposition* and had given the original to his State court attorney, Mr. Soden [R. Tr. 680]. Kapelus was promptly impeached by his own attorneys, Mr. Stodd and Mr. Harwood. Mr. Stodd stated [R. Tr. 993]:

“MR. STODD: I am not personally affronted but I would like to have in the record either from the stand under oath or if Mr. Trost will accept it informally I can state that I did contact Mr. Soden’s office and was informed by his secretary that she had the original.

“I asked if she could release it.

“She said not without Mr. Soden’s authorization. Mr. Soden is out of town now. I asked her to see if it was signed.

“She did say it was not.

“I asked for changes.

“She said there were none, and then I asked her to look in the files for an additional copy which she was unable to find.

“According to her I do not have a copy in the files nor has one been turned over to me nor have I ever seen one.

“THE REFEREE: I think the statement is sufficient. It doesn’t have to be under oath.”

And Attorney Harwood on Tuesday, December 29, at Appellees’ request, produced the original deposition, which contained no changes [D-78; R. Tr. 824-825].

Thus, by the seventh trial day it finally appeared that any changes Kapelus made must have been in a *copy*, not the *original*.

When Kapelus was interrogated concerning existence of a copy, he testified [R. Tr. 991] that he checked his files and was unable to find the copy. He did not know if Mr. Barnett had it [R. Tr. 992]. But, when confronted with proof that the *original* had not been "corrected", he conveniently found the copy [R. Tr. 1037-1039]:

"BY MR. TROST: Q. Mr. Kapelus, counsel has produced a copy of your June 23, 1964 deposition containing certain changes. I have that in my hand.

I will hand you that deposition and ask you if that is the deposition that you were referring to when you say you corrected the deposition that was transcribed some time earlier in 1963? A. Yes.

Q. Where did you locate that? A. That was located in a batch of papers over at Mr. Barnett's home.

...

Q. Was Mr. Barnett home when you located that? A. No, he was not. The maid was there.

Q. Did your records show any transmittal to Mr. Barnett? A. No.

Q. When did you make those corrections? A. Those corrections were made sometime prior to the date on which this matter was calendared for trial in the State court.

I don't recall the exact date, but it was sometime around August of this year, or last year, pardon me.

Q. When did you sign the deposition? A. At that time.

Q. Did you sign it in front of a Notary Public? A. No. I had it signed and we were going to — well, the answer is no.

Q. Did you make those corrections available to the court reporter or to Mr. Walker?

...

A. I don't know. I gave the copy to Mr. Soden prior, just prior to the time of the trial.

Q. Were any of the corrections that are contained in blue ink in that copy made at any time after that date? A. No, I don't believe so.

Q. Is that the copy which you made corrections upon? A. There are some other not in my handwriting.

Q. Do you know if Mr. Barnett made any other corrections? A. I don't see any corrections other than in my hand-writing although there are a couple of scratch-outs here.

Q. When you made the corrections in the deposition were you making corrections in the transcription or corrections in the truth of the statement? A. Some were corrections in transcription and some of them were in regard to some confusion that existed at that time in regard to dates, particularly in regard of dates and sequences of events."

APPENDIX D

Kapelus Denies Receiving December 31 Telegram.

Appellees sent a telegram [D-54] December 31, 1963, to Kapelus tendering performance under the option. Kapelus avoided delivery. He testified inconsistently with reference to the telegram incident: For instance, during examination of Franklin concerning Debtors' 54 the following colloquy from counsel table [R. Tr. 372-373]:

"Q. Is this the telegram?

I neglected to ask Mr. Kapelus to produce the telegram. I would like to have it in lieu of our copy.

MR. KAPELUS: I can state that that telegram was never received as is witnessed by my letter of a subsequent date. A copy was received though on the 13th of the following month.

MR. WALKER: Do you have a copy?

MR. KAPELUS: I believe so.

MR. WALKER: Would you produce the copy, please?

MR. STODD: This isn't a copy of that telegram. This apparently is some other telegram sent by Mr. Reedy to Mr. Kapelus; isn't it?

MR. KAPELUS: Apparently.

MR. WALKER: Let me see it.

MR. STODD: Second telegram purporting to be a copy of something else."

The *second* telegram is Debtors' Exhibit 55 [R. Tr. 376] and shows "received 1-17-64". (Emphasis supplied.)

The second telegram *was not* a copy of the first telegram.

Kapelus, when questioned about the second telegram, testified [R. Tr. 583]:

“Q. You will recall that while you were sitting at the counsel table you produced a telegram that was received by you on January 17, 1964.

I will show you Debtors' Exhibit number 55 for identification. A. Yes.

Q. Do you recall producing that telegram from your file? A. I do.

Q. Do you recall it stating the date on which that telegram was received? A. On or about the 17th.

Q. Do you recall whether or not you said you had ever received any other telegram from Mr. Reedy or Mr. Franklin? A. Would you rephrase the question?

Q. Read it back, please.

(Question read.)

A. At that time?

Q. Yes. A. At the counsel table?

Q. Yes. A. I believe I made the statement that a copy of that telegram or a telegram marked copy was received on the 13th of December of 1964.

Q. Is that the telegram? A. I mean January 13, pardon me.

Q. Is that the telegram that you received? A. No. I believe that the other one was submitted at the time of the taking of my deposition in the State Court matter.

Q. Submitted to whom? A. Mr. Walker.

It may have been added as an exhibit to the original deposition.

Q. In other words, you received two telegrams?

A. That is right."

Thus, having finally admitted that he received two telegrams, he testified [R. Tr. 585] that he had "forgotten" about the first telegram.

"Q. You stated that the copy of the telegram that you received was Debtors' 55 for identification? A. I stated that I received Debtors' 55 for identification. However, I had forgotten at the time that I had also received this on or about the 13th.

Q. When was your recollection refreshed that you did receive a copy of a telegram prior to the 17th? A. After reviewing my records in the deposition."

He had to admit receipt prior to the 17th because in his own letter [D-68] dated January 14, 1964 to Reedy he said: "I have at hand your telegram of January 13, 1964 by which you purport to exercise the option. . . ." And Kapelus never did produce the original telegram [R. Tr. 1040]:

"Q. Did you find the telegram that has been missing? A. No."

Kapelus then attempted to put the onus for the "disappearance" of the missing telegram on attorney Walker and reporter Davis who took Kapelus' deposition in the State court action at Walker's office on June 23, 1964. Thus, Kapelus claimed [R. Tr. 584]:

"Q. Is that the telegram that you received?

A. No. I believe that the other one was sub-

mitted at the time of the taking of my deposition in the State Court matter.

Q. Submitted to whom? A. Mr. Walker.

It may have been added as an exhibit to the original deposition.”

And again Kapelus testified [R. Tr. 588]:

“Q. Where is that telegram that you received on the 14th? A. I don’t know. It was submitted at the time of taking of the original deposition.

It was presumed that either Mr. Walker or the reporter had it. It wasn’t attached to the original deposition submitted to me.”

But Kapelus was impeached by deposition reporter John R. Davis who testified no documents were handed to him at the deposition hearing [R. Tr. 1018-1019].

Davis was corroborated by Walker’s testimony [R. Tr. 1345-1346].

APPENDIX E

Kapelus Denies That He Instructed His Secretary on January 21, 1964, to Draw a Deed.

Kapelus first asserted that the option expired on January 16, 1964 by its express terms. If subsequently, on January 21, 1964, he were shown to have agreed to draw a deed conveying back the west one-half of the Katella property, it would contradict his contention that the option had expired.

When examined on this point, Kapelus categorically denied instructing his secretary to draw the deed [R. Tr. 621]:

“Q. At that time with Mr. Franklin, Janes, and Carol Wood, and Mr. Reedy, did you instruct your secretary to draw the deed that was to be given back to Carol Wood? A. No.

Q. You did not? A. No.

Q. At any time that day in the presence of Mr. Franklin, Mr. Reedy, Mr. Janes and Miss Wood or any of them, did you instruct your secretary to draw the deed? A. No.”

Kapelus was impeached by Carolyn Wood [R. Tr. 1218], Franklin [R. Tr. 353], Reedy [R. Tr. 848] and David Janes [R. Tr. 1313].

Carolyn Wood testified [R. Tr. 1218]:

“We got into the conversation of the deed. I think Mr. Franklin opened the conversation with ‘Do you have the deed’ or something like that.

“Then I do remember Mr. Kapelus replying, ‘Well, I’ll have to have it drawn.’

“He called for his secretary and she came in and he told her to draw the deed for Mr. Franklin.

She left the room. I believe he gave her instructions as to the parties conveying it but nothing about the description.

“Of course this was, I believe, metes and bounds description. I recall it was lengthy.

“Mr. Franklin must have thought that too because he spoke up and said, ‘What about the description?’

“Mr. Kapelus said, ‘She knows the description. She is familiar with the property’ or some property. ‘She was aware of what property this was.’”

APPENDIX F

Kapelus Claims Tender Under Option Was Not Valid and Someone Tampered With the Option Date.

Kapelus, realizing he was on mortally weak grounds on the mortgage vs. deed issue, retreated to a claim that:

- (1) The debtors had previously breached the option;
- (2) The tender on January 21, 1964 under the option was too late; and
- (3) The tender was improper.

However, on each point Kapelus was effectively discredited.

Kapelus first contended that what seemed to read January 26, in his handwriting, really was January 16, written by him as such and so intended by the parties [R. Tr. 709].

Then, when it appeared to him that the instrument really did read "January 26" *to everyone else but him*, Kapelus began to claim that the instrument must have been tampered with, even though he had contended that what appeared to be a "2" was the way he wrote a "1". Kapelus testified [R. Tr. 702-710]:

"Q. Did you yourself put the number, whatever it is, before the 6th on that option? A. Yes, I did. I would like to qualify it.

Since obtaining this document or since it being presented in court in checking this against photostatic copies which would arise from the Recorder's office and studying the letter under a glass, the letter before the "6" appears that it is in a dif-

ferent ink or slightly different ink, that a hook has been extended from it.

...

"Q. BY MR. TROST: You did write a figure in front of the '6' on the option. That is my question, that was your handwriting? A. Yes.

Q. Was that any particular kind of '1' that you put in there, an Arabic '1' or Roman numeral '1' or what? A. I was attempting to conform the handwriting to the pica '1' or to the pica type that was there on the typewritten face which would be a '1' with a bar below it.

Q. Did you attempt to conform the word 'January' to pica type? A. No, I apparently wrote that, 'January.'

Q. Are those your initials next to January? A. Yes.

Q. Did you write or print your initials? A. I scribbled my initials.

Q. But on the '1' or the figure that was in front of the '6,' that is what you did in conforming with pica type? A. That is correct."

So it became necessary for Appellees to establish:

- (1) That the option was prepared by Kapelus;
- (2) That the interlineation was in fact made by him, with his own hand at the escrow office in the presence of numerous persons, on September 23, 1963 (although he had earlier testified in his deposition that the meeting at United occurred on September 17, 1963).

Appellees then proceeded to prove that after Kapelus interlineated the option at United on September 23,

1963, the instrument was left on escrow officer Broussard's desk and it remained in the possession of United Title Guaranty Company until recorded. For instance, Broussard testified [R. Tr. 1171]:

“Q. After it was deposited with you passing for the moment when it was deposited, after it was deposited with you did that instrument ever leave the possession of United Title Guarantee [*sic.*] Company before it was recorded? A. No.”

Franklin impeached Kapelus [R. Tr. 339]:

“Q. . . . After this instrument was corrected in that particular, what was done with it, to your knowledge? A. We discussed it very briefly. Then he handed it to Broussard and said, ‘Record this as the next paper.’

Q. Did you ever have that paper in your hand again until after it had been recorded in the Recorder's office of Orange County? A. No, sir. I had it the moment to look at it and to hand it to Mr. Reedy who signed it and then back to Mr. Kapelus.”

Reedy also impeached Kapelus [R. Tr. 830-831]:

“Q. Did you observe this instrument which is marked Debtors' 33 at the time of that discussion? A. Yes, it was there.

Q. Did you observe someone write upon it there in the booth? A. Yes, I did.

Q. Who did you observe write on it? A. Mr. Kapelus.

Q. Where did he write on it? A. He changed the date that the option expired. That would be on page 3.

Q. At the top of the page? A. Yes, sir, the second line on the top of page 3.

Q. What did he do there? A. He wrote a '2' in front of the '6th' day of the month. Then he changed the month of December to January.

Q. Did you observe him do that? A. Yes, sir.

. . .

Q. Then what was done with the instrument, to your knowledge? A. It was given to Mr. — well, Mr. Franklin then read it then he handed it to Mr. Brussard [*sic*].

Q. Was that the last you saw of it in Mr. Brussard's [*sic*] presence? A. Yes, sir.

Q. Did you ever see that document again until after it has been recorded? A. No."

Appellees then prepared several exhibits consisting of blow-ups of the Recorder's recording of the option, in black on white, and in white on black, and introduced them in evidence to show that the Recorder's photograph of the option instrument received from United Title for recording on October 10, 1963, was identical with the exhibit in this case [D. 104, 105]. Indeed, Kapelus never contended the option was to expire on January 16th until after the tender of the option price on January 21, 1964 [R. Tr. 1366].

APPENDIX G

Kapelus Claims He Prepared and Delivered to the Debtors an Assignment of the Judgment.

Kapelus testified [R. Tr. 997-1001]:

“Q. Did you prepare a copy of an assignment of judgment? A. Not personally. It was prepared by my secretary. I dictated it. . . . It was dictated about, I recall it was probably about three or four weeks before it was actually transmitted. I think it had been lying around on Barnett’s desk.

No. I recall we were waiting for Barnett to come into the office and sign it. We finally mailed it to him.

Q. Did Barnett ever come in the office and sign it? A. No. It was mailed to him and he signed it and returned it by mail.

. . . .

A. I dictated a letter of transmittal.

Q. When did you dictate the letter of transmittal? A. Sometime that day. I presume *December 6.*” (Emphasis supplied.)

But in his earlier deposition testimony Kapelus, when asked what his *first contact* was with Reedy or Franklin after October 10, 1963, testified it was the *27th of December, 1963* [R. Tr. 1512]:

“Q. . . . I am concerned namely now with the events that transpired with reference to the option, with reference to the property, with reference to your dealings with Reedy or Franklin. What was the first incident? A. Well, wait a minute, I don’t understand the question as it is posed. It is a little broad. Do you mean my first contact in

regard to the property or my first contact in regard to Reedy or Franklin, which is it?

Q. Your first contact with Reedy or Franklin.”

And Kapelus’ Answer [R. Tr. 1513]:

“‘A. It was on the 27th of December, 1963. I sent a *letter* to Curtis Reedy by certified mail in which I requested a copy of the tax statement showing the paid receipt.’” (Emphasis supplied.)

Thus he omitted any reference to a contact of Reedy by his December 6th transmittal letter which purportedly contained the assignment of judgment.

Kapelus was *promptly impeached* on this line by Reedy [R. Tr. 969]:

“Q. Did you ever receive the assignment of the judgment? A. No.

Q. Have you ever seen the assignment of the judgment? A. No.”

And Kapelus was impeached to the same effect by Franklin. Moreover, the assignment of judgment was never recorded in the Superior Court action [R. Tr. 370, 1001; Cl. Tr. 109].

APPENDIX H

Kapelus Claims He Required the Estoppel Statement.

Appellants, in support of their contention that the parties intended to transfer title, additionally relied upon the estoppel statement. Kapelus did not let the matter stop there, but testified [R. Tr. 1116]:

“Q. Would you explain, please? A. . . . I did notice several Advance Sheet notations during that period of time in regard to, I think it was the Workmen Construction case. That was going up on appeal in regard to an alleged claim which was later denied by the Supreme Court that an option contained in the face of a deed would transform the deed in legal effect into a mortgage.

Being cognizant of that this is one of the reasons why I made the demand to Bob Broussard *while we were there* that I wanted no confusion in that respect.” (Emphasis supplied.)

But Broussard [R. Tr. 1160] testified that United Title Guaranty Company obtained its title insurance from Western Title Insurance Company; that the title consultant [R. Tr. 1159] Lester Jones, in his own handwriting, prepared the rough draft of the estoppel statement [D-100]. Then Broussard gave these devastating answers [R. Tr. 1160-1161]:

“Q. Immediately after receiving the instructions that are dated September 16, 1963, did you and Lester Jones confer, talk about that escrow?
A. Yes.

Q. After you and Lester Jones talked about that escrow did he prepare the handwritten notes

and furnish them to you that are now marked Debtors' Exhibit 100? A. Yes.

Q. Did you then at the instruction of Western Title Insurance Company prepare this instrument? A. No.

Q. At the instruction of United Title Guarantee [sic] Company? A. It is nobody's instruction except for ourselves, I mean Mr. Jones and myself.

Q. Perhaps I should rephrase the question. Was it your idea to prepare this instrument? A. No, not mine; it was Mr. Jones' actually.

Q. So did Mr. Jones instruct *you* to prepare it? (Emphasis supplied.) A. Yes.

Q. And to send it to Mr. Kapelus? A. Yes."

Broussard further testified that the estoppel statement had been drafted and typed by September 17, 1963 [R. Tr. 1158] and 3 copies were sent to *Kapelus* in the covering letter [D-41], which clearly put *Kapelus* on notice that Western Title would not insure the west one-half of the Katella property unless the statement were signed "For the benefit of Western Title Insurance Company" [D-2]. "*Otherwise this would have to be treated as a deed in lieu of a mortgage and would not be insurable.*" [D-41] (Emphasis supplied.)

And Reedy testified further that, on September 23, after all of the documents had been signed by the principals [R. Tr. 831]:

"Q. Toward the same point of time in the escrow booth there, did someone else come to Mr. Broussard's office just before you left? A. Yes. Some official in United Title. . . .

A. He brought a paper in that he said, when he brought it in, he said he would like to have that signed so that he could issue the title insurance because he couldn't issue title insurance unless it was.

Q. Was it signed? A. Yes.

Q. By whom? A. By me."

These circumstances sufficiently interested the Referee that he inquired further of the witness Reedy [R. Tr. 835]:

"THE REFEREE: That is Respondents' Exhibit number 2 placed in front of you.

The title people said you either sign or we cannot issue you title insurance. Is that the sum and substance?

THE WITNESS: Yes, sir, exactly right.

THE REFEREE: Mr. Franklin instructed you to go ahead and sign it under those conditions?

THE WITNESS: Yes."

Kapelus' behavior in this instance further provoked the following colloquy between the Referee and counsel [R. Tr. 1576]:

"THE REFEREE: I recall Mr. Kapelus testified that the Workman [sic] case sticks out because he had already read it before he testified. He said he knew it was on appeal and was aware of all the holdings or something to that effect. He got worried about it and he said to keep this from being a security transaction or a possible mortgage situation that in view of what he learned about the preliminary matters in connection with that case that he told Mr. Broussard to change this right now and set up a so-called estoppel letter or affidavit.

MR. TROST: I do.

MR. STODD: That is my recollection and also that Mr. Kapelus testified he was aware that the case was up on appeal. . . .”

The significance of this entire incident occasioned a comprehensive separate finding that the statement was prepared by and for the title insurance company [Cl. Tr. 106].

No. 20991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET CENTER,
INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of
JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN,
LEATRICE FRANKLIN and FLORENCE FITZGERALD, also
known as FLORENCE JAMES, as Joint Venturers or
Copartners, and JOSEPH J. FRANKLIN, also known as
J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE
FITZGERALD, also known as FLORENCE JAMES, indi-
vidually,

Appellees.

PETITION FOR REHEARING.

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FILED

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WM. B. LUCK, CLERK

JUN 13 1967

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Appellees.

PETITION FOR REHEARING.

Pursuant to Rule 23, Ninth Circuit Court, the Appellants herein respectfully petition for a rehearing on the following grounds:

1. Appellants believe that this Court failed to consider the fact that the issues tried and determined by the Referee in this case were already pending trial in the state court, where the Debtors (Appellees) had first initiated an action to have the deed declared a mortgage and to quiet title [Rep. Tr. Vol. IV, pp. 449-450].

The Bankruptcy Act, Chapter XI, Section 314, gives the Bankruptcy Court only the power to *enjoin* or *stay* actions in the state court and not the power to seize jurisdiction over the controversy itself. The Courts are unanimous in holding that such a seizure is improper.

“The court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property . . . When this jurisdiction has attached, the court’s possession cannot be affected by actions brought in other courts. . . .”

“It is fundamental that one court may not wrongfully take away from the other in whose custody it is, possession of a res and then ‘claim jurisdiction over the property because it is in the possession of the court’ ”.

Bryan v. Speakman, 53 F. 2d 463.

“The possession of the res vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto . . . Nor is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court . . . the rule has been declared to be of especial importance in its application to Federal and state courts.”

Farmers Loan and Trust Company v. Lake Street, 177 U.S. 51.

“The trustee contends that, since the property was in the possession of the bankrupt when the petition in bankruptcy was filed, the case falls within the well-established rule permitting summary jurisdiction of the controversy in such circumstances . . .

This contention disregards the fact that by the foreclosure suit the state court had already taken constructive possession of the property. Possession of the res vests the court which first acquires jurisdiction with power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. Nor is the rule limited to cases where actual control has been exercised in the first suit before the second is instituted; it extends as well to a suit in which the court may do so in the progress of litigation. . . . The principle that one court will not snatch a res from another's mouth is equally applicable to a court of bankruptcy."

In re Greenlie-Halliday Co., 57 F. 2d 173.

2. This Court has stated that it will not disturb the "Referee's determination" of the question of possession. The evidence is clear that the Referee in fact made no such determination. His decision on summary jurisdiction [beginning at Volume XIV, page 1678, of the Reporter's Transcript] was that he had summary jurisdiction only for the following reasons:

"At this time the Court finds that the transaction was nothing more than a security transaction." [Page 1583, lines 18, 19].

"We conclude that the debtors acting in a capacity of a Receiver as of now had an equitable ownership in this property from the date that they made the valid and legal tender of money at Mr. Kapelus' office on the 21st of January, 1964 . . . Then they have had equitable ownership throughout this period of time up until the date that they went into Chapter XI which was on August 26, 1964." [Page 1688, lines 11-22].

“Basically, we conclude we have summary jurisdiction based on the Chapter XI Proceeding, Section 311 and the California Code Sections which we have had to construe together with the cases.”

“Looking to all the facts and circumstances coming up to the intent of the party basically it was stated as a security transaction was the intent of the parties from the beginning.” [Page 1694, lines 12-19].

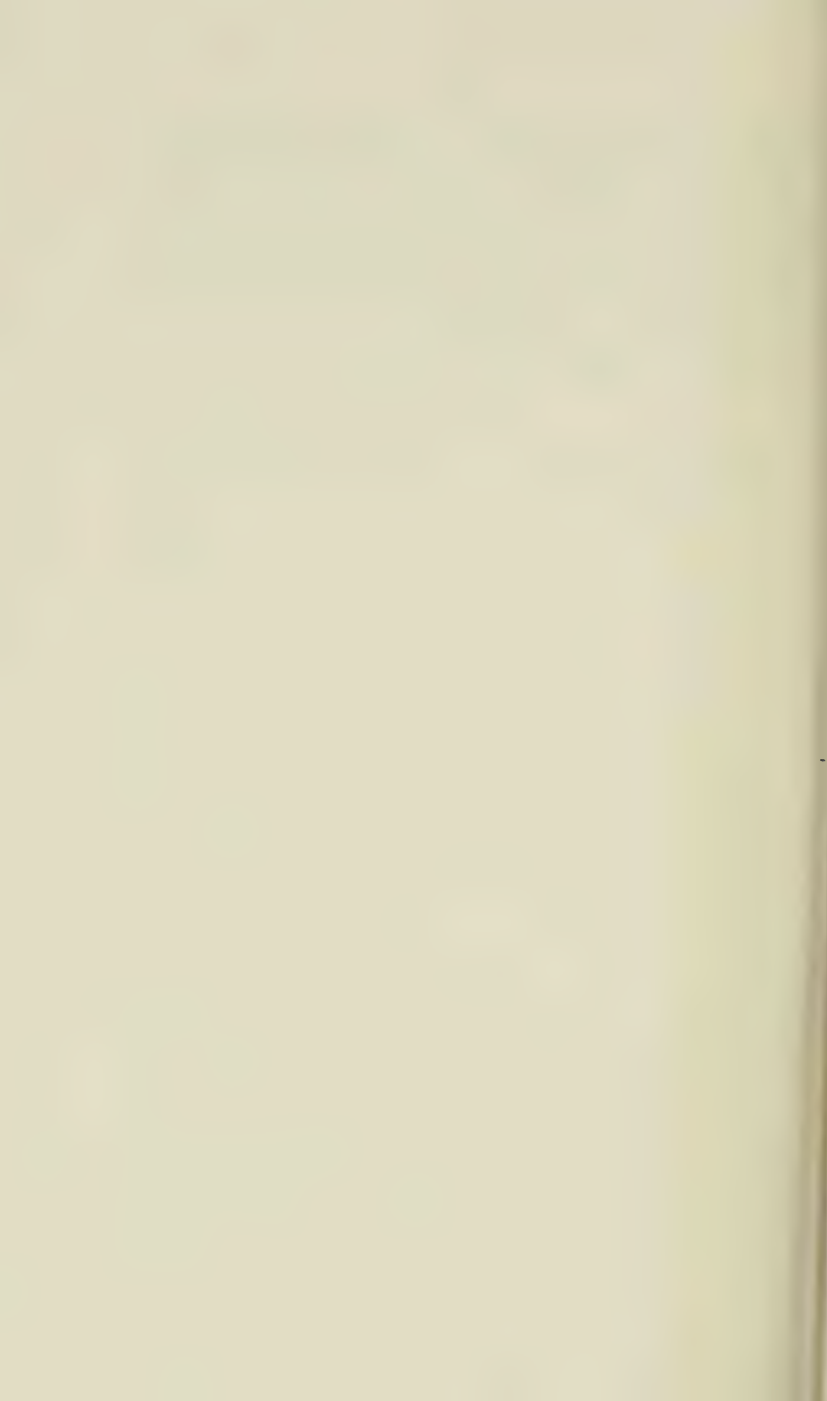
3. This Court has affirmed a finding of summary jurisdiction with the statement that the evidence is sufficient that the Debtors (Appellees) were in actual possession of the subject property, but refers to only one act which might indicate a right to possession in the Appellees—that they “removed signs . . . from the property”. Said statement is not supported by the evidence, which actually shows that the Debtor Franklin admittedly did not know when this sign was removed [Rep. Tr. Vol. IV, p. 448]. The evidence actually shows that the subject property was totally unimproved, unoccupied, unused, and not susceptible to physical possession by anyone [Rep. Tr. Vol. IV, p. 440].

4. This Court has stated as a fact that “the property was worth ten to twenty times the value of the antecedent debt”. Assuming that the Court is referring to the option price of \$20,500.00 as “the antecedent debt” (which was actually \$9,461.81), the record contains no evidence to establish such a property value. The *only* remotely qualified evidence was by an appraiser presented by *Appellees* who testified that the property had a total value of \$150,000.00 [Rep. Tr.

Vol. X, p. 1247]. Against the property was a trust deed with a balance due of approximately \$85,000.00. Furthermore, the evidence shows clearly that the subject property was transferred *in exchange* for another property which the Debtors subsequently were able to encumber for at least \$135,000.00.

Respectfully submitted,

JOHN P. STODD,
Attorney for Appellants.



Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

JOHN P. STODD,

Attorney for Appellants.



Service of the within and receipt of a copy
thereof is hereby admitted this.....day
of June, A.D. 1967.

No. 20,993 ✓

In the
United States Court of Appeals
for the Ninth Circuit

SCOTT LUMBER COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

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No. 20,993

In the

United States Court of Appeals

for the Ninth Circuit

SCOTT LUMBER COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is a condemnation case brought by the Government to secure title to a private existing road through private forest lands in Shasta County, California, owned in fee by the Scott Lumber Company, against Scott and others including the Southern Pa-

cific Land Company and the Watt interests. (T 1.)* Summary Judgment was granted (T 160) with respect to all issues except the amount of compensation to be paid to Appellant, Scott. The issue of damages was tried before a jury which rendered a verdict (T 206) fixing the compensation at \$691.00. Appellant moved for a new trial (T 217) which was denied (T 237) and Final Judgment (T 212) was entered. An Appeal was duly taken from:

- (a) The Summary Judgment.
- (b) The denial of the Motion for New Trial.
- (c) The Final Judgment.

This Court has jurisdiction under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE WITH RESPECT TO SUMMARY JUDGMENT

Appellant, Scott Lumber Company, Inc., hereinafter referred to as Scott, is engaged in logging and the production of wood products. It owns some 26,000 acres of timberland and has its mill at Burney in Shasta County, California. Its mill uses some logs from its own forest property but mostly purchases selectively marked standing timber from others, principally the U.S. Forest Service. The roadway condemned by this action is an existing system of three parcels on Sec. 31 in Shasta County, which section is owned in fee by Scott and is one of a number of separate parcels in the vicinity of Burney owned by Scott. This section is an integral part of Scott's timber holdings (T 27), all of which are inextricably involved in the land management program of long term sustained yield, in compliance with the California Forest Practice Act,

*Throughout this Brief T will be used to designate the Transcript of Record prepared by the Clerk of the District Court and R will be used to designate the Reporter's Transcript.

to preserve this timber as a resource and assure a constant supply of timber for the years to come.

In order to visualize the property involved, Exhibit G (R 132) has been reproduced as Appendix B at the end of this Brief. This shows the entire Sec. 31 with the condemned roadway marked in green and the danger tree strips forming a part thereof shown in yellow bordering the condemned right of way on both sides.

Scott resisted the taking by a timely Motion to Stay the Action (T 18) which was treated as a Motion to Vacate the Order of Possession and combined with a formal Motion to Vacate Possession (T 77). Scott also answered the Complaint (T 50) and included an affirmative defense (T 51) that the taking was not for public use and benefit, was confiscatory and was without due process of law. Numerous affidavits were filed by Scott in support of its position (Berry, T 26; Martin, T 123; Spann, T 126; Rollow, T 131). Contrary affidavits were filed by Government employees (Mason, T 100; Stathem, T 103; Dole, T 108; Edward, T 113; Dole, T 117). In addition, the Government filed Requests for Admissions of Fact and Interrogatories. Answers were furnished promptly by Scott (T 60). The affidavits, pro and con, show the marked dispute as to the material facts relative to the nature of the taking. Before the Motion to Vacate was heard, the Government filed a Motion to Determine a Preliminary Legal Question (T 136), advising the Trial Court that there was no need under the authorities to consider the Scott Motion, since it had the absolute right to take any roads which were or might be useful in order to manage its timber resources.

A Memorandum and Order (T 153) were issued sustaining the Government's position. The Government requested (T 160) this Order to be arbitrarily converted into an Order for Summary Judgment against Scott under F.R.C.P. Rule 23(c); and

Summary Judgment was entered thereon (T 160). Scott appeals from the Summary Judgment at this time under F.R.C.P. Rule 56(d).

STATEMENT OF THE CASE WITH RESPECT TO THE JURY TRIAL ON THE AMOUNT OF COMPENSATION

After the entry of Summary Judgment the only issue permitted by the Trial Court to go to the jury was the amount of compensation due Scott for the taking. All of the other several named Defendants disclaimed any ownership or rights in the property taken and gave up any claim to the proceeds for the taking (Southern Pacific, T 188; Watt Interests, T 193e). The Government moved for a Pre-Trial Hearing (T 189) and the Pre-Trial Hearing was had pursuant to Rule 16 F.R.C.P. and the Pre-Trial Order was entered July 28, 1964 (T 194). On this Appeal Scott relies on the error, amongst others, committed by the Trial Court in *sua sponte* failing to follow the Pre-Trial Order in any material respect, to the sole and material prejudice of Scott.

The issue as to the amount of compensation was determined by a jury (T 17c). The trial began December 1, 1964 (R 12) and ended December 17, 1964 (R 1708). Just before the instructions and in commenting on the evidence, the Trial Court attacked (R 1662, *et seq*) and struck from the record all of the valuation testimony of Defendant's experts Sanders (R 1668) and Wall (R 1666), these being Scott's chief witnesses. The case was submitted to the jury solely upon the testimony of the Government experts. On the basis of this circumstance the Court considered, but sidestepped, a Motion for a Directed Verdict (R 1606; 1612-21). However, the instructions were given based upon the figment that this was the usual case where there was conflicting evidence of value. The jury received its instructions on December 17, 1964 (R 167). Shortly thereafter the

jury rendered a verdict setting compensation in the sum of \$691.00 (T 206), the exact amount testified to by Howell (R 1318). Judgment was entered thereon, January 7, 1965 (T 207). Promptly thereafter Scott filed a Motion for a New Trial (T 217) which was heard by the Trial Court, April 8, 1965. On December 28, 1965, a Memorandum Order was entered denying the Motion for a New Trial (T 237). A Notice of Appeal to this Court was filed February 15, 1966 (T 254). The matter comes to this Court alleging error in the trial and in the denial of the Motion for a New Trial.

SPECIFICATION OF THE ERRORS RELIED UPON

The errors urged on this Appeal are as follows:

1. The Court erred in entering the Summary Judgment of March 31, 1961 because there was no showing whatever by the Government that there was no genuine issue as to material facts, or that the Government was entitled to judgment as a matter of law. On the contrary, the pleadings, depositions and affidavits on file show a very sharp disagreement on material facts which were in issue.

2. The Court erred in disregarding and acting contrary to the Pre-Trial Order prepared by the Government which stated unequivocally that the agreed facts "shall henceforth govern these proceedings."

3. The Court erred in accepting the valuation figures testified to by the Government witnesses, which testimony was insufficient because:

- (a) They failed to take into consideration the Forest Practice Act of the State of California.

- (b) They considered only the most profitable use of the land in determining value.

- (c) They considered only one kind of informed prospective purchaser, i.e., the buyer who owned no other timber land.

(d) They did not consider the agreements and conditions of the Forest Service Special Use Permits issued by the Forest Service for use of such roadways which forbid the closing of the roadways for any purpose and therefore control of the roadway for purposes of logging was impossible.

and because of these deficiencies there was not sufficient evidence to support the verdict.

4. The Court erred in striking the testimony of Defendant's valuation experts, Sanders and Wall, and denouncing them just prior to the instructions to the jury, which was tantamount to directing the jury to disregard all of Defendant's valuation testimony to the discredit of and irreparable damage and prejudice of Defendant's case. All of this brought about an unexplained divergence between the rulings as to the exclusion of Defendant's evidence and the statements with respect thereto just prior to the instructions to the jury, and the instructions themselves, which is also error.

5. The Court erred in failing to recognize and hold that Defendant's initial objections to the Instructions to the Jury were continuing objections to each and all of them.

6. The Court erred in failing to instruct the jury with respect to critical issues which failure was bound to result in a miscarriage of justice, and more particularly in the following respects:

(a) That Sec. 31 was owned in fee by the Defendant, Scott Lumber Company, at the time of the taking.

(b) That in the determination of value, the prospective purchaser could be other than the "cut out and get out" timber buyer not interested in owning land or timber land.

(c) That the Government's valuation experts did not take into account one of two types of prospective purchasers and based their valuation figures only on depletion cutting.

(d) That the highest and best use of Sec. 31 was for the production and management of timber which could not be accomplished by depletion cutting.

(e) That the Government witnesses were not qualified to express any opinions as to the most profitable use of Sec. 31, and that figures based upon the most profitable use are valueless.

(f) That the loss of a controlled road, replaced by a Special Service Road where the public cannot be excluded is an element of damage for which Defendant should be compensated.

SUMMARY OF ARGUMENT

This condemnation suit was tried in two parts. The first part involving the propriety of the Government's taking of this private property, was decided on a Motion to Determine a Preliminary Legal Issue which was converted by the Government into an Order for Summary Judgment after the Government received a favorable decision on its earlier Motion. Appellant contends that so far as this portion of the case is concerned, the taking was pursuant to an agreement between the Forest Service, the Watt private interests and the Lorenz Lumber Company to implement their private agreement to destroy competition and prefer the interests of Lorenz and Watts without any public need or purpose. Appellant contends further that the taking for such purpose is illegal and insufficient to make it a taking for a public purpose. Since the facts were in dispute, Summary Judgment was neither proper nor permissible. The granting of Summary Judgment was error.

The second portion of the suit was the trial before a jury to determine just compensation to Scott for the taking of its property. Here there had been a Pre-Trial Hearing at which certain controlling facts had been stipulated and embodied in a Pre-Trial Order prepared by the Government attorney. The

Order stated *inter alia*, that these agreed facts would "thereafter govern these proceedings".

The Trial Court did not follow the Pre-Trial Order, but *sua sponte* and without notice struck out and ignored the Stipulation, allowed the Government to impeach Appellant's experts because of the claimed existence of easement rights by Southern Pacific, struck the testimony of Appellant's experts primarily for their failure to consider such easement rights, and thereafter instructed the jury that the failure of Appellant's witnesses to cover such conflicting ownership could be used to discredit all of Appellant's position. This precluded the possibility of a fair jury determination, imparted bias to the jury, and was clear error, requiring reversal and remand for a new trial.

Assuming, *arguendo*, the striking out of all of Defendant's valuation testimony was proper and justified, the same rules and standards applied to Appellant's valuation experts were not applied to the Government's valuation experts and had the same standards been applied their testimony would have been stricken because of their ignorance of and failure to consider essential facts.

Thus the Government witnesses were allowed to ignore the *Forest Practice Act of the State of California* which made the basis of their valuation, "clear cutting", illegal and contrary to public policy if done by a private citizen. The Government experts instead, were allowed to adopt the theory and base their valuations upon the most profitable use of the land which is concerned with economics and accounting in which areas neither witness was qualified to express any opinion or conclusion; they considered only one kind of prospective purchaser in making their valuation, namely one not subject to California law and who owned no other timber land, to the complete exclusion of another admittedly different kind of purchaser, one who did own other timber land and was subject to California

law; the Government witnesses were allowed to ignore the printed standard conditions of the Forest Service Special Use Permits, which were contrary to the facts to which they testified and upon which they based their valuation opinions. Accordingly, because of these deficiencies and the insufficiency of a sound basis for the expression of opinions, their conclusions were also valueless, and therefore, there is not sufficient evidence to support the verdict of the jury.

Furthermore, the Court erred in timing the striking of the valuation testimony of Appellant's experts to come just before the instructions which inflamed and prejudiced the jury against Appellant and had the effect of discrediting all of Defendant's testimony. This brought about an unexplained divergence in the rulings which the jury was unable to handle, i.e., the striking of the valuation testimony as separated from any other testimony by Defendant's witnesses, leaving the jury with the impression that only the Government witnesses were to be believed. Finally, the Court erred by failing to instruct the jury with respect to critical issues, the failure of which was bound to result in a miscarriage of justice, which is just what occurred. There is no pretense that these instructions were requested by Appellant or were denied over objection. They were, however, necessary to a proper trial and the Court should have given these in the proper control of the litigation. While these may not be specific issues on an appeal, nevertheless, they were proper for consideration on a Motion for New Trial and the failure of the Court to recognize this failure and grant a new trial is error which requires reversal and remanding for a new trial. The determination of just compensation to Scott was impossible.

Upon all of the circumstances it abundantly appears that the evidence cannot support the verdict of \$691.00 as fair compensation for the land, and that the determination of fair compensation to Appellant was denied through the errors which

are here asserted on Appeal. It should be noted that in matters of condemnation, a private citizen is faced with a proceeding brought by a Federal agency, with Federal attorneys and before a Federal tribunal. The Federal Courts under those circumstances have a heavy responsibility to make certain that just compensation is determined only after a fair and impartial trial. That was not done here. For this reason alone the suit should be remanded for a new trial.

ARGUMENT

The right of a private party to own and hold property even against the Government is protected by a Constitutional prohibition against its taking except for public use, and only then for just compensation (United States Constitution, Fifth Amendment). The Government did not take the entire Sec. 31 owned by Appellant, Scott Lumber Company, Inc., but only the portion thereof comprising the road system of three parcels and the timber bordering the existing roadway (R 1231). The taking occurred May 18, 1960.

THE COURT ERRED IN ENTERING SUMMARY JUDGMENT

Rule 56(c) F.R.C.P. provides that Summary Judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Throughout the course of several motions in the early stages of this litigation there was never any attempt by the Government to show through the pleadings, the Answers to the Interrogatories, depositions or the Affidavits that there was no genuine issue as to the material facts or that the Government was entitled to judgment as a matter of law. The issue raised by all of the pleadings and supporting documents,

was whether the taking was for a public purpose; Scott's proof being that it was primarily a scheme to favor one lumber mill, the Lorenz Lumber Co., as against Scott in particular, as well as any other operator within the area, and that the Congressional authority for condemnation does not exist for this purpose.

There is no dispute that the road system consisting of three parcels shown in green on Exhibit G reproduced as Appendix B at the end of this Brief, was an existing fire trail system which had been made by Scott into a prudent operator's logging road (R 78, 1153) suitable for the cutting and removal of timber on Sec. 31 and for the transport of timber thereover by operators in the surrounding areas (R 20-21; 59). A much larger area is affected by the taking as this includes the yellow portion as well as the green portion which is the road itself. This prudent operator's logging road varied from twelve to eighteen feet in width and was a dirt road which was carefully built and maintained, watered during the dry season, graded constantly and drained by the installation of culverts. It is carefully prepared for the winter season to prevent erosion and disruption of the road surface. It is kept this way in order to maintain the heavy traffic of logging trucks and other necessary equipment with the maximum smoothness and facility and a minimum of delays.

By referring to the plat which is the area which is also reproduced as Appendix C at the end of this Brief, it will be observed that Sec. 31 is reproduced in blue and that within the designated lines the area colored green are those belonging to the Forest Service and those in red by the Watt Interests. The only other privately owned timber land is reproduced by yellow and a dark green. This was the area to be controlled by the agreement between the Forest Service, Watt, and Lorenz, and the road was needed through Sec. 31 to carry out the terms of this private agreement (T 32, 34). The Government, of course, has no sawmill. The Watt Interests have large holdings of timber land in this area (T

27) but no sawmill. The Watt Interests were, therefore, instrumental in bringing Lorenz into the area, and Lorenz established a sawmill, but has no timber land in this area (T 31, 33). Thus, Scott and Lorenz are direct competitors for the timber products of this area (R 23, 1197). In conveying Sec. 31 to Scott, the Watt Interests reserved a right to pass over the road system on Sec. 31 in order to move their products to the Lorenz mill (T 33). The Watt timber in Sec. 19 to the north was cut by Lorenz in 1958 in the area known as Snow Cabin (T 31).

Prior to the condemnation in this case Watt and Lorenz tried to buy the Scott mill (T 33). Failing in this, the Government in conjunction with Lorenz initiated negotiations with Scott for the use of the road system through Sec. 31 (T 33). Scott offered to let anyone purchasing Government timber haul the logs over this road system without the payment of any fee and with only the usual maintenance provisions (T 31, 38). However, the negotiations bogged down because of the Government's insistence that it own these roads (T 36). Since the ownership in other hands could affect management of all of Scott's lands and because of the danger of competitive prejudice, Scott refused to part with title. Condemnation was filed prior to the close of negotiations (T 38).

For what purpose then did the Government condemn these three parcels? Certainly not to build logging roads to remove Government timber because prudent operator's logging roads were already there (T 27) and available without charge except customary maintenance. Certainly not for administrative purposes for the Government had the right to pass over these roads at all times, particularly for fire control and suppression purposes (R 69). Accordingly, condemnation was not necessary either to build a road or to move Government timber over the road. Condemnation was not necessary for recreational purposes because Sec. 31, since the surrounding sections involve difficult steep terrain, was not particularly adaptable for recreational purposes (R 1145, 1146).

The only remaining purpose discernible from the record is that the Government wished to increase the width of the roadway (T 22) from the then width of twelve to eighteen feet to its present width of twenty-eight to thirty feet to favor the larger, unusual and publicly illegal equipment utilized by Lorenz. A thirty foot width road is not needed for logging because most logging vehicles and particularly those employed by Scott over the years, conform to the State of California truck and trailer load widths of a maximum eight feet. The existing road system was adequate for these needs (R 99).

It was apparent that Scott had nothing to gain by joining in or implementing this agreement because (T 34-35):

(a) The purpose of the agreement was to confer private benefit to Lorenz and to the financial detriment of Scott.

(b) It would destroy the usefulness of Sec. 31 in Scott's over-all plan of timber management.

Although no written agreement was ever signed between the Forest Service, Watt and Lorenz, the substance became the agreement (T 68) and was put into operation without Scott through the means of this condemnation.

While the condemnation here appears at first blush to be in the public interest, a reading of the testimony and the affidavits of both parties contains convincing evidence to the contrary. Scott is in the hapless and hopeless position of having its land expropriated by the Government for discriminatory private benefit of its competitors, while destroying a part of its own property. Scott has no remedy except to appeal to this Court.

The clear preference to Lorenz is pointed up by the fact that Lorenz does not use standard size logging trucks, but uses the so-called "off-highway vehicle", which has an over-size width, height and weight and is illegal for use on public highways.

The width averages from eleven to twelve feet and are prohibited and illegal on State highways. It is a matter of simple arithmetic to show that standard width logging trailer loads eight feet wide such as Scott and almost every other logger uses, can pass comfortably on an eighteen foot road area while "off-highway" vehicles cannot do this. Both the Government and Scott were well aware that Scott could not be forced to widen the existing roadway. Thus the present plan was adopted. The problem was solved and a competitive advantage given Lorenz in the sale of Government timber by this condemnation. In competitive bidding and sale of Government timber the cost of hauling is an important factor (R 1163). If Lorenz had to pay the upkeep on longer roads, and could not pass over Sec. 31, it would have to include its higher truck cost. If, however, it could use its illegal "off-highway" equipment on special Government roads it could haul more logs at a lesser cost than its competitors, and the base cost would not be paid by it—but rather by the Taxpayers—including Scott. It is clear that Scott, by using vehicles complying with the State highway laws, was penalized.

The above facts, of course, are disputed in many instances by the Government. Scott does not urge here that its position would be sustained upon a trial, but only urges that these facts should have gone to the jury for determination as to whether the taking was for a private purpose.

THE COURT ERRED IN DISREGARDING AND ACTING CONTRARY TO THE PRE-TRIAL ORDER

The Pre-Trial Order (T 194-196) was prepared by the Government after the Pre-Trial Hearing. It was entered pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule ND-3, and stipulated that it "shall henceforth govern these proceedings" (T 194).

With respect to the status of the ownership by Scott of the entire Sec. 31 and the encumbrances upon it, said Order provided in paragraph (2) (T 195):

“(2) That at the time of taking the land involved was owned in fee simple by Defendant Scott Lumber Company, Inc. subject, however, to certain easements and rights of way vested in Defendants, R. G. Watt and Alice McCourt Lamm, individually, and as Trustee of Trust “B” of the estate of W. E. Lamm, deceased.”

There is no dispute that the Pre-Trial Order was agreed upon as controlling the trial and that Scott relied thereon. The Trial Court, however, ignored the Pre-Trial Order and permitted testimony with respect to the claimed ownership of an additional easement by the Southern Pacific Land Company. This testimony was utilized for two purposes, *first* to show depreciated value of Scott's property, and *second* to discredit Scott's experts who did not refer to this aspect of the case in their testimony. The Government's valuation experts testified that they examined the records and found that the property was subject to easements of both the Watt Interests and the Southern Pacific (Howell, R 1304; Linville, R 1405) and both had used these items as encumbrances (Howell, R 1304, 1349; Linville, R 1406) substantially limiting the value of the property both before and after the taking. Counsel for the Government made no request at any time to be relieved of the stipulation and Order.

Rule 16 does not require that the stipulations in a Pre-Trial Order controlling the course of the litigation shall freeze the trial into a solid state regardless of subsequent developments. The Rule specifically provides that the Order may be modified at the trial upon request to prevent manifest injustice. It does not, however, contemplate *ex parte* departures, particularly if made by the Trial Court *sua sponte*, after one party has put in his entire case in reliance upon the Order.

To the contrary, the Courts of this Circuit in reliance upon Rule 16 of the Federal Rules of Civil Procedure and Local Rule ND-3, underscore the necessity of compliance with the Pre-Trial Order and the agreed facts, except where relief is necessary, after notice, to prevent manifest injustice.

In *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir., 1956), Chief Judge Denman noted: (p. 941)

"Appellant contends that the District Court erred in refusing to allow her to show pain and suffering in child birth and the necessity of shortening the gestation period to seven and one half months caused by her injuries. The District Court stopped her attorney in the midst of discussing this item of damage in his opening statement and refused to allow the presentation of evidence on the point because appellant had failed to disclose such a contention at the pre-trial conference. Appellant urges that the pre-trial order when construed with information known by appellees covers such an element of damage.

* * * * *

"Federal Rules Civ. Proc., rule 16, 28 U.S.C.A. provides that a pre-trial order 'controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.' One major purpose of such an order is to eliminate surprise by sharpening and simplifying the issues which must be tried. The District of Oregon has strictly required the disclosure of 'all legal and fact issues' at the pre-trial conference since 'surprise, both as a weapon of attack and defense, is not to be tolerated under the * * * Federal procedure' and the 'rules outlaw the sporting theory of justice from Federal courts.'

* * * * *

"Assuming appellant had no intention of catching appellees off guard at trial, she easily could have moved for an amendment to the pre-trial order to specifically include such a claim for damages. Even after appellant's counsel was stopped by the trial judge while he was discussing this issue with the jury, no such motion was made.

"The District Court did not err in this respect."

In *Ringling Bros.-Barnum & Bailey C. Shows v. Olvera*, 119 F.2d 584 (9th Cir., 1941), Olvera contracted with Ringling Bros. as an independent contractor, to perform as a trapeze artist. Language in the contract released the circus from ordinary negligence under Florida law, and likewise in Texas where there is no public policy against contracts which exempt one from liability for ordinary negligence. The refusal of requested instructions predicated liability of the circus solely on gross negligence was reversible error. The Court held: (p. 584)

"The injuries to Olvera occurred in a performance while the circus was traveling through Kansas. At the pretrial conference it was stipulated that Florida was the place of making of the contract and the stipulation made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial (Federal Rules of Civil Procedure, rule 16, 28 U.S.C.A. following section 723c). At the trial there was evidence from which it could be inferred that the contract was executed in Texas, but the order was not modified and we hold the stipulation is binding."

In *First Federal Savings & Loan Ass'n. of Bremerton v. United States*, 295 F.2d 481 (9th Cir., 1961) the District Court granted the Government specific performance of a contract to lease, which appellant considered inequitable because the rent did not represent reasonable value. The Court held: (p. 482)

"In this case certain witnesses testified giving their opinions as to the reasonable rental value of the premises here involved and the sums stated by them were substantially in excess of the rental agreed in the contract for lease referred to in the trial court's opinion. The trial court made no findings as to the reasonable rental value and gave no consideration to the question of whether the agreed rental was or was not inadequate.

* * * * *

"However, the case was tried after a pre-trial conference and on entry of an order defining the issues to be tried and

setting forth the contentions of the parties with respect to the facts and the law. The question of the adequacy of the consideration and the fairness of the contract was not listed as an issue in the pre-trial order which undertook to set forth all of the issues of fact and of law to be tried and determined by the Court.

* * * * *

"For the reason we have suggested, the trial court was not obliged to take any action in respect to this argument of the appellant since the issues before the court had been completely defined and formulated in the pre-trial order mentioned. As noted in Rule 16 F.R.Civ.P., 28 U.S.C.A., the purpose of such a pretrial order is 'the simplification of the issues'."

The Order here was made with the clear assent of both parties. There was no reservation of the point now raised by the Government and supported by the Trial Court. No application was made by Government counsel during the trial to be relieved from this Pre-Trial Order, and the Court did not take any action to do so, or to protect Appellant from any release from the Order during the trial.

It is possible that the Trial Court may have believed it could ignore the Pre-Trial Order and that its attack upon Scott was to further justice. However, the authorities uniformly hold that if a party is to be released from his agreement at pre-trial because of a *subsequent* change of circumstances, then the Court must impose protective terms to prevent harm to the opposing party, and the failure to do so is reversible error.

Moore's Federal Practice, 1964 Supplement to Vol. 3, pp. 74, 75:

"In relieving counsel of pretrial stipulations to prevent injustice, the court must impose protective terms to prevent harm to opposing party and failure to do so was reversible error." [Citing *Laird v. Air Carrier*, 263 F.2d 948 (5th Cir., 1959)].

Seminar on Procedures, "The Pre-Trial Order" by Hon. A. Sherman Christenson of the U.S. District Court, Utah, 29 FRD 191, at 378:

"While the trial court has the right to relieve counsel of pre-trial stipulations to prevent manifest injustice, it should impose suitable protective terms or conditions to prevent substantial harm to the opposing party. The court errs in relieving a party of a stipulation as to a crucial fact without imposing appropriate conditions to protect the opposing party." [Citing *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir., 1959)].

There was nothing at the trial which required the alteration of the Pre-Trial Order, and it is very clear that the Trial Court failed to impose any measures to protect Scott; on the contrary, its final act in striking the testimony of the Scott experts at the close of the entire case, came after it was too late for Scott to amend its proofs. This is reversible error.

Why did Scott's attorney not call the provisions of the Pre-Trial Order to the Court's attention? This is easily answered. He was a young, inexperienced attorney who had not participated in the Pre-Trial Order (R 39). Furthermore, there was no way of knowing that the Trial Court would rely upon the alleged ownership by Southern Pacific to destroy Scott's case. At the time counsel became aware of the situation, the testimony had been closed and the statements made to the jury before he was permitted to object (R 1669). One of the major benefits of the Federal Rules of Civil Procedure, including pre-trial, is to do away with trickery and entrapment and to make sure that the judgment is based upon merit, not on the adversary's adroitness.

Witnesses on behalf of Scott, Messrs. Berry and Toler, testified that at the time of the purchase in 1951 the Southern Pacific easement had been cleared away by the title company, so that there were no other deeded rights of way except those of the Watt Interests stated in the deed (R 83; R 252). Further there was no

adjacent land owned by Southern Pacific Land Co. which would have rendered the right of way valuable and of substance (R 1283). Thus Scott's witnesses by failing to testify as to the Southern Pacific so-called easement were merely affirming what was believed to be true, and that which was stipulated as true by the Pre-Trial Order.

The gravity of the departure from the Pre-Trial Order did not appear until near the end of the trial, just before the instructions were given. At that time the Trial Court, in commenting on the evidence, stressed: (R 1662)

"During the trial I have indicated to you on more than one occasion that the opinion of a so-called expert witness is only as good as the reasons that back it up. That is, the reasons and the knowledge upon which it is based.

* * * * *

"For an expert to base his opinion on facts as the expert chooses to interpret the facts is one thing. But for an expert to base his opinion on erroneous facts is something else."

The Court then added that if an expert assumed erroneous facts which were basic to the opinion such that it would be substantially changed if he had known or considered the true facts, then the whole opinion became worthless.

Following this observation the Trial Court then directed the jury's attention to the testimony of Scott's valuation expert Wall, treating it as a horrible example of careless testimony and striking it because, *inter alia*, Wall had arrived at his opinion as to value without considering the Southern Pacific Land Company easement, which apparently did not exist. Thus the Court stated: (R 1663-4)

"Now, we have such a problem in this case in the valuation opinion of Mr. Wall, one of the valuation witnesses for Scott Lumber Company. Mr. Wall admitted in reaching his opinion as to the before and after value of the property in question he did not know that the Southern Pacific Company

and its assigns and successors had a right to cross the property or transport timber across Section 31. Yet the record contains uncontradicted evidence that the Southern Pacific did have such a right. Additionally, he assumed that as of May 18, 1960, the United States Government had no right to utilize the road system on the property whereas the evidence has been established without contradiction that these roads could be used by the Forest and other officers of the United States on official business."

The Trial Court's very words contain the repudiation of the terms of the Pre-Trial Order and its striking of Wall's testimony merely completed the error. At this point Scott's case was hopelessly prejudiced and the gravity of the error is plainly apparent.

The Trial Court's comments on the right of the Government to pass over Sec. 31 ignored the Government's stipulation that it had no deeded right to do so (R 255). However, it is true that all land within the Shasta-Trinity National Forest wherein the Forest Service is responsible for fire protection, by custom and by law the Government is given the right to pass over the land for administrative or fire purposes. The Government has always had this right (Berry, R 69; Toler, R 238). However, the Trial Court's language made it appear that the Government already owned an easement or had other title.

The Trial Court's prejudice as to Wall because of what it believed to be his ignorance of the valuable ownership of the Southern Pacific Land Co., was further exemplified when it told counsel, after both parties had rested but out of the presence of the jury: (R 1597)

"Now going from there to his [Wall's] lack of knowledge of the right of Southern Pacific to use a right of way across the property, I don't know how I could possibly instruct this jury to devalue Mr. Wall's opinion after I had told them he had made an erroneous assumption with reference to Southern Pacific's right to cross the property.

* * * * *

"He is in error in this respect because there is no evidence in the record to the contrary. All we have is the evidence that Southern Pacific did have a right of way across the property and we have no evidence to the contrary."

The stipulation by the parties in the Pre-Trial Order had, of course, accounted for the "lack of evidence to the contrary."

Nor was the reference to the Southern Pacific an isolated instance where the Trial Court permitted the Government to ignore the Pre-Trial Order, without equivalent protection to Scott.

In another instance, concerning a possible reversion, the Court instructed the jury that the estates and interests condemned by the Government were: (R 1678)

"in case of permanent abandonment of the right of way by Plaintiff, the title and interest therein taken shall end, cease and terminate, and title shall revert to the then owners of the underlying interests in said right of way."

This instruction is contrary to the Pre-Trial Order wherein it was stipulated in paragraph (3): (T 195)

"Defendants, R. G. Watt and Alice McCourt Lamm, individually, and as Trustee of Trust "B" of the Estate of W. E. Lamm, deceased, have previously appeared in this proceeding and *have disclaimed any further interest in the estate condemned* and in the amount to be awarded for the taking herein." (Emphasis supplied)

Thus, the jury was instructed on facts contrary to the Pre-Trial Order.

And, in the opinion denying the Motion for a New Trial the Trial Court *sua sponte* again impeached the Pre-Trial Order by referring to a letter (T 248) from the attorney for the Watt and Lamm interests, not in evidence and not in the record, in which it was requested that the Pre-Trial Order should state that in the event the Government abandoned the easement the interests were

to revert back to the parties. This is not what the Pre-Trial Order states. Paragraph (3) of the Pre-Trial Order states, (T 195) that they:

"* * have previously appeared in this proceeding and have disclaimed any further interest in the estate condemned * *"

This is what Scott relied upon in its case. Thus, even after being specifically advised of the Pre-Trial Order, the Trial Court still insisted upon ignoring it to the sole injury of Scott. After many meetings Scott and the Government had entered into the stipulations. In return for the stipulation as to ownership, Appellant stipulated as to the value of the timber taken. When the Trial Court ignored one stipulation, it should have also released Scott from its stipulation as to value of the timber, and granted the new trial.

THE TRIAL COURT ERRED IN ACCEPTING THE VALUATION FIGURES OF THE GOVERNMENT WITNESSES BASED UPON ERRONEOUS ASSUMPTIONS

As has already been pointed out, every effort was made to impress the jury that the opinions of an expert witness must be soundly based, and that Scott's witnesses did not fulfill this standard (R 1666).

Thus the Trial Court instructed the jury: (R 1675)

"A witness wilfully faults in one material part of his testimony is to be distrusted in others. The Jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point."

And again: (R 1686)

"However, you are instructed that certain witnesses may not base their valuations upon unwarranted theories of law or assumptions of fact, nor upon matters of a speculative or conjectural nature; nor may be [*sic* the] opinions of expert

witnesses be based upon a sequence of conjectures. To the extent that the opinion of any of the expert witnesses is based upon such matters, his testimony is of little value and should be disregarded."

With the castigation and elimination of the valuation opinions of Appellant's experts, Wall and Sanders, and with no comment by the Court upon the valuation opinions of the Government witnesses, these instructions can only exaggerate the situation and mislead the jury into believing that the Government witnesses were above any fault. The same standards were not applied to the Government witnesses. If they had been then the Government valuation opinions would also have been stricken.

Government Valuation Experts Formed Their Conclusions Without Consideration of the Forest Practice Act of the State of California

It is believed to be uncontroverted and incontrovertible that the most dominant consideration of forest lands is the preservation of the timber as a natural resource. This is inseparably tied to the principle of conservation (R 1128). The Forest Service in charge of Federally owned timber property has an established policy for and practices long term timber management. By this is meant that the timber is treated as a product to be harvested so that there is a continuous yield without depletion or exhaustion of the timber as a resource (Howell, R 1373; Stathem, R 1128, 1137, 1191). The Government is dependent upon selling its timber to privately owned mills in the maintenance of this practice, but under no circumstance will the Government sell timber except on the basis of sustained yield timber management to insure that there will always be a timber resource for the American people (R 1139). Private timber owners also, have assiduously followed the practice of timber management and without it private forest industry could not exist. Scott has practiced timber management for years and Sec. 31 is, of course

inextricably a part of the timber management program (R 18, 140). It seems axiomatic that there can be no conservation of the timber resource, whether publicly or privately owned, without long term timber management. Southern Pacific Land Company operates its timber property on a management basis to conserve the timber as an asset (R 1289) and so does the P.G. and E. (R 1281). Again, Mr. Stathem testified that after careful analysis the Forest Service: (R 1154)

“* * had determined the best and highest use of this area was for the harvesting of the timber, managing the timber crop.”

It is abundantly clear from the testimony that both Government valuation experts Howell and Linville based their valuation opinions not upon timber management and conservation but contrarily upon the immediate harvest of all of the timber on Sec. 31, all 898 acres (Howell, R 1336, 1314; Linville, R 1437, 1409, 1466). Both of these witnesses testified as to what they meant by clear cutting or immediate harvest. Linville testified that clear cutting meant that they would cut all of the trees with no “attempt to save any of the trees that you are not forced to leave” (R 1466-7). They based their valuations on clear cutting the section on a “cut out and get out” basis, leaving only stumps (R 1455). They also used, in arriving at their valuations, not forest land but stump-land or cut over land, (Howell, R 1259, 1261, 1294, 1299, 1307-10; Linville, R 1420, 1453). Such clear cutting operation Linville testified would take no more than from one to two years (R 1464). Howell said within a year (R 1394). When this was finished the land would have a value only as stumpland and Linville testified that there was a good market for stumpland (R 1422, 1454). This had a different market than timber land (R 1422, 1454). There can be no question but that the Government testimony is conclusive that the valuation opinions were based upon the clear cutting of Sec. 31. In denying the Motion

for a New Trial the Trial Court held in effect that private timber owners could cut as they pleased regardless of the illegality, immorality and stupidity of the clear cutting (T 249-250).

There can be no doubt that the conclusions of the Government valuation experts necessarily involve a failure to consider the laws of the State of California, because clear cutting is illegal and against public policy. There is no question but that Sec. 31 is privately owned timber land within the jurisdiction of the State of California and that the cutting of privately owned timber land is governed and controlled by the Statutes of the State of California. The *Public Resources Code* of the State of California defines the purposes in Section 4901* as follows: (pp. 369-370)

"GENERAL PROVISIONS AND DEFINITIONS.

"§ 4901. This chapter may be known as the Forest Practice Act. The purpose of this chapter is to declare the existence of a public interest in the forest resources and timber land of this State; *to declare the necessity of good forest practices in the harvesting of forest resources to conserve and maintain the productivity of the timberlands in the interests of the economic welfare of the State* and the continuance of the forest industry; to establish forest districts in which standards of forest practice shall be adopted to promote the maximum sustained productivity of the forests; to authorize the creation of district forest practice committees which shall formulate and adopt forest practice rules, and approve forest management and alternate plans for final approval of the State Board of Forestry; to specify the manner in which forest practice rules and plans shall be administered; and to provide for the functioning of the district forest practice committees in an advisory capacity to the State Board of Forestry.

"The public interest is affected by the management of forests, timberlands, watersheds and soil resources of the State, and it is the policy of this State to encourage, promote

*Effective September 11, 1957 and in effect at the time of the taking.

and require such development, use, and management of forests and timberlands as will maintain the continuous production of forest products, to the end that adequate supplies of forest products are assured for the needs of the people and industries. It is the policy of this State to encourage and assist private ownership in the management and economic development of privately owned timberlands.” (Emphasis supplied)

Thus, it is against the public policy as established by this Code to cut timber land on any basis other than management of the timber lands, so as to maintain the continuous production of forest products to meet the needs of the people and industries.

There is no question but that Sec. 31 falls squarely within the definition of timber land provided in Section 4904 of the Code. There is also no question but that the prospective purchaser for Sec. 31 whether he be a timber owner as defined by Section 4907, or a timber owner-operator as defined by Section 4908, or a timber operator as defined by Section 4910 of the Code, all are equally bound by the single definition of the “Timber operations” in Section 4911 of the Code. In other words, the Forest Practice Act applied in 1960 not only to mill operators, but to any private purchaser, whether he desires to clear cut or not.

By Section 4936 of the Code, a committee was established for the determination of forest practice rules which have the binding effect of law when approved by the State Board of Forestry.

All logging or timber operations in the State of California on privately owned land in 1960, at the time of the taking, was subject to a valid permit from the State Forester, a condition of which was the unconditioned warranty to abide by the minimum cutting rules established pursuant to the Code. Thus, before any prospective purchaser could cut any privately owned timber land, whether he was another timber land owner or a gypso, he was required to subscribe to the principles of forest management and the preservation of the timber resource, and to cut accordingly.

Amongst the rules promulgated pursuant to the Forest Practice Act published in February, 1960, by the State of California Department of Natural Resources, Division of Forestry, which form a part of the California Administrative Code, and the particular rules referring to the North Sierra Pine Forest District (II) in which Sec. 31 is located, a statement of purposes is clear:

"921. Statement of Purposes. The purpose of these rules is *to establish minimum standards of forest practice for promoting maximum sustained productivity of the forests of the North Sierra Pine Forest District in the interests of the economic welfare of the State of California and the continuance of the forest industry, as contemplated by the Forest Practice Act (Section 4901 et seq., Public Resources Code).*" (Emphasis supplied)

The minimum cutting practices are provided in Article 3 and are as follows:

"923. Cutting Practices. Every operator shall take precautions and necessary actions in all harvesting operations on timberlands *to insure continuous production of forest products.* To comply with these provisions, he shall regulate his cutting operations for different conditions and circumstances as follows:

"923.1. Minimum Diameter. Every timber operator shall conduct his timber operations so as to leave uncut all thrifty, immature ponderosa pine, sugar pine, Jeffrey pine, incense cedar, white fir, Douglas fir, red fir and white pine trees *that are not at least 20.0 inches D.B.H., except as provided in Section 923.2 of these rules.*" (Emphasis supplied)

The Public Resources Code of the State of California and the Forest Practice rules promulgated pursuant thereto must be accepted as authority to show that there are not two standards, one for the cutting of public timber lands and a different one for private timber land, that the Forest Practice Act of 1957 (Pub. Res. Code § 4901) made certain that they were in conformity.

There is no evidence that the Government valuation experts ever considered the laws of the State of California regarding the cutting of timber on privately owned property. To the contrary, if they had it would have been perfectly apparent that clear cutting not only would be against public policy as stated by the Code, but a punishable offense. It is clear, therefore, that the Government experts gave opinions as to value based upon a practice which is contrary to the stated public policy and contrary to law as set forth by the California Forest Practice Act. Thus, under the *Olson* case,* such a use could not be legally considered since the land was not "adaptable" to the use upon which the value was predicated.

No clearer manifestation of the disregard for the actual law or actual facts can be found than the complete disregard of the State law. In sum, Scott finds itself damaged because it adhered to the law of its sovereign—the State of California. While the Forest Service and the Federal Government often are free to ignore State law—private citizens are not.

The Government Experts Considered Only the Most Profitable Use of the Land in Determining Value

In the absence of any comparable sales, as is the case here (Howell, R 1293; Linville, R 1410-11), market value is sometimes determined on the basis of the highest and best use to which the land in question may be put. Here, the jury was so instructed (R 1680). Mr. Stathem, the U.S. Forest Service Supervisor for the Shasta-Trinity National Forest (R 1124) in which Sec. 31 is located (R 1134) testified that the Forest Service made a careful review of all of the land within the forest under his charge to determine the highest and best use,—what it is best suited for (R 1136), and determined that the highest and best

*See p. 32 *infra*.

use was for the production of timber (R 1137, 1154). This included harvesting and managing of timber on a controlled management basis (R 1145, 1154) which would assure a permanent supply of timber. This was precisely what Scott was practicing with respect to Sec. 31 prior to the taking (R 20, 27, 29) and Stathem agreed (R 1191).

When asked to split the highest and best use, considered from a forester's point of view from other points of view, Stathem was confused and so stated (R 1191). From a forester's point of view there was no doubt that the highest and best use of Sec. 31 was for sustained yield timber management and control. The road system here was an integral part of that use (R 28, 21). Otherwise the entire value of Sec. 31 could be locked in.

Then began a metamorphosis under the questioning of the Government attorney. He persuaded Mr. Stathem to alter his testimony such that highest and best use from an *economic* point of view was the most profitable use and became something different from highest and best use from a forester's point of view. (R. 1193) It seems evident that highest and best use is the one arrived at taking into consideration all uses, not the fiction of an "economic" or profit use.

The Government valuation witnesses bluntly stated that the valuations given by them were based upon a use with the most profit. Howell definitely stated and repeated on several occasions that both his before valuation (R 1298-99) and his after valuation (R 1314, 1337, 1356) were based solely upon the highest and most profitable use. Linville's testimony was to the same effect (R 1437). This, in turn, was predicated upon devoting this land to one particular use, clear cutting, as will be shown later herein. By any definition or understanding, profitable use is an economic term, and whether a particular use is profitable or not,

is an accounting matter dependent upon a particular operation taking place, which together with the business considerations, may be compared with the result to determine whether or not a profit can or cannot be made. Neither Howell nor Linville were either economists or accountants. Neither did they qualify as experts in economics or accounting (Howell, R 1244; Linville, R 1398). Furthermore, they did not have any factual basis upon which to testify as to the overall profit or profitable use by anyone in this industry. Instead they thought only in terms of a quick dollar. Accordingly, their valuation opinions are based upon matters upon which they were not entitled to give any opinion. It seems appropriate to apply the Government attorney's observation: (R 1014)

"Anyone can come to a conclusion, but unless he has a sound foundation for that conclusion, the conclusion is worthless."

The Trial Court adopted the Government's position solely and instructed the jury (R 1680) that market value was to be determined upon the highest and most profitable use. A timely objection was made to this (R 1606) to no avail. The Court made no comment with respect to the Government's testimony in this connection or in any connection for that matter, and this together with the instruction could only result in reversible error. In accordance with the Trial Court's own instructions to the jury that experts may give opinions only in the areas where they are qualified by training and experience, the Government valuations are erroneous and valueless.

It should not take any feat of logic to show that market value cannot be determined solely by the most profitable use, which was the only consideration of the Government valuation experts. Indeed, even if it be accepted that the most profitable use is

clear cutting, as urged by the Government, then this use ignores the State law, for it is illegal under the California Forest Practice Act. A profitable use is also determined by the skill or the lack of it in the person who conducts the use. The use might be profitable under one circumstance and unprofitable under another. Profitable use depends upon the market value of logs and lumber which have been subject to great upward and downward swings, particularly in the critical years. Thus, the most profitable short term use is not a sound basis for determining market value.

The Government sought to justify equating highest and best use in determination of market value with highest and most profitable use under the authority of *Olson v. United States*, 292 U.S. 246, 255, 256; 78 L.Ed. 1236, 1244, 1245; 54 S.Ct. 704 (1933). In that case the Federal Government took easements of flowage upon lands bordering Lake of the Woods (partially located in Minnesota). The easement was to raise the lake water level to a certain contour for water storage purposes. The three petitioners separately owned, in Minnesota, a total of 1326 acres of shoreland below this contour, which acreage would be flooded. The raising of the lake level to the specified contour would also offset 2215 miles of shoreline located in Canada, numerous islands, land in Minnesota, and would affect 850 parcels of land owned by 775 persons, or a total of 1225 persons including mortgagees, etc. It would also affect the Canadian Government owning all the Canadian shorelands.

The award to the petitioners was based on their land as being agricultural, and excluded any consideration of their land's adaptability as water storage uses. Furthermore, the trial judge refused to admit any evidence proffered on behalf of petitioners in which they were seeking to prove adaptability of their shoreland for water storage uses. The Circuit Court affirmed the judgment of the District Court.

In affirming the judgment of the lower court, the U.S. Supreme Court held that the trial court did not err in refusing petitioners' offered evidence as such use of petitioners' land is not within the realm of reasonable probability and should be excluded from consideration.

The Supreme Court also stated: (p. 255, 78 L.Ed. at p. 1244)

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. *The highest and most profitable use* for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, *not necessarily as the measure of value*, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." (Emphasis supplied)

To bring the holding of the *Olson* case into the Ninth Circuit, they cited *United States v. 711.57 Acres of Land in Eden TP, Alameda County, Cal.*, 51 F.Supp. 30 (DC, ND, Cal. 1943) which was an opinion by Judge Goodman.

Parcels of land, agricultural and in some cases improved by buildings and other farm appurtenances, were included in the land, subject of this condemnation case in connection with Russell City Airfield. The Court said at pages 31 and 32:

"[1] The issue that I am called upon to determine here is the 'market value fairly determined as of the date of taking.' *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed.; *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L. Ed. 1236.

"As frequently stated, market value is 'what a willing buyer would pay in cash to a willing seller.' *United States v. Miller*, *supra*, [317 U.S. 369, 63 S.Ct. 280, 87 L.Ed.].

"[2] It is settled that 'where actual sales cannot be used as a basis for ascertaining "market value" * * * appraisals are made and the jury decides from the various appraisals and other evidence, what the "market value" is.' *Washington Water Power Co. v. United States*, 9 Cir., 135 F.2d 541, 542, decided April 30, 1943.

"[3] It is also settled that a witness may base his appraisal on the 'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.'" *Olson v. United States*, *supra*, [292 U.S. 246, 54 S.Ct. 708, 78 L.Ed. 1236].

Thus, under the authorities, the "most profitable use" must be supported by its adaptability or immediate need. There is no such testimony in this case. Indeed State Law prohibits such adaptability.

The shortsighted most profitable use is not the test. It is stated in Vol. 4, Nichols, *Eminent Domain*, p. 140:

"The ultimate test of value is the use to which men of prudence, wisdom and means would devote the property if owned by them."

The wise use of timberland is conservation (Stathem, R 1128). That is the highest and best use of Sec. 31. According to the Government experts, the highest and most profitable use of Muir Woods, for example, as a piece of property, would be to clear cut all of the redwood trees as fast as possible. Yet this is not the use men of wisdom have put it to.

Moreover, the *Olson* case does not state that the short term most profitable use is to be equated with highest and best use; it merely states that highest and most profitable use is to be considered in determining value. It is but one factor, such as demand, limitations of law, and other incidents which go into the determination of fair market value. It is to be observed that Judge Goodman was careful to include the full quotation which

included the limitation concerning the use of the term "highest and most profitable use."

Thus, in law there is no justification for equating "highest and best use" with short term "highest and most profitable use" as the sole means of determining market value. Yet this was done in this case. Vol. 5, Nichols, *Eminent Domain*, p. 245:

"All factors which would be considered by a reasonable purchaser and seller in fixing the value should be considered by the witness in reaching his opinion. An opinion based exclusively upon one factor should be rejected."

Fair Market Value May Not Be Founded Upon Only One Kind of Mythical Prospective Purchaser of the Property

Under the law, the determination of fair market value by an expert appraiser is to place himself in the position of a willing and informed buyer who is under no compulsion to buy and determine what he would pay for the property both before and after the taking (Howell, R 1293; Linville, R 1379). There is no disagreement that this is a proper approach to the determination of fair market value.

The testimony here unmistakably establishes that a prospective buyer for this property could be either of two kinds (Stathem, R 1192; Linville, R 1465), first, the buyer who owned *no* timber land, or second, the buyer who owned other timber land. It is apparent that the market value of Sec. 31 to each of these potential purchasers is quite different (Howell, R 1395; Linville, R 1465, 1455) and that the differences are most important. Stathem testified that even the methods of appraisal are different (R 1191-2), in the first instance it is appraised as timber and in the second as timber land.

The value of Sec. 31 to the first type of buyer who owns no other timber land would obviously be only in the value of the timber itself (Howell, R 1359, 1379). Not owning any other timber land he could not practice conservation of the timber resource

nor operate the section on a land management program. The Government witnesses all agree as to this fact (Stathem, R 1192; Howell, R 1359, 1379; Linville, R 1465). He would also regard the stumpland after the section had been cut over as a liability (Linville, R 1465) and he would discount this as much as possible in establishing the amount he would be willing to pay. He would obviously be interested in the immediate harvest of all timber on a "cut out and get out" basis (Howell, R 1366) and he would have no reason or even a desire to conserve the timber as a natural resource on a continuous yield basis (Stathem, R 1192; Linville, R 1466).

It is only this second type of buyer who owns other timber land who can practice timber management and who is interested in the future and who must do as the Forest Service does, i.e., preserve this natural timber resource and harvest it on a management basis for a continuous yield. To him the land and the timber of Sec. 31 will make it possible to do this on a more extended and reasonable basis, and so the over-all value includes not only the timber but the land, and the over-all value is completely and entirely different for him. Stathem readily admitted that the owner of timber land could not operate on a "cut out and get out" basis (Stathem, R 1192). An immediate harvest would require large and different kinds of equipment (Linville, R 1438). Yet this fact was not even put to the jury under the Trial Court's views. Scott found itself tried by the Court with the jury's only province to decide which of the two Government witnesses to believe.

The Government valuation experts Howell and Linville based their values on one type of buyer only, i.e., the buyer who owns no other lands and his only interest is in the timber alone on a "cut out and get out" basis (Howell, R 1336; Linville, R 1437). To exclude one class of buyer from consideration of value either consciously or unconsciously results in an error of fact which

cannot but affect and alter and discredit the Government opinions as to value.

The Government Valuation Experts Assumed Incorrect Facts Concerning Special Use Permits for Special Service Roads

During the course of the trial the scope and validity of the Special Service Roads operated by the Forest Service became a major factor in the determination of the fair market value of Sec. 31 after the taking. There was no dispute that the improving of the old road system after the taking would make it become a Special Service Road (R 1202; Howell, R 1372) and that its use for logging would be subject to the strict control of the Forest Service under Special Use Permits (R 1156).

So far as Scott is concerned, or any similar purchaser, any road access for the timber management of Sec. 31 would thereafter have to be done pursuant to a permit, as distinguished from a matter of right. Neither Scott nor any purchaser could build another road system because of the difficulty and limitations of the terrain (R 21). After the taking, the logging of Sec. 31 must conform to the Special Use Permit by the Forest Service. This would be true no matter who the private purchaser might be. The Government's position was simply that a purchaser normally could log in the usual way without additional cost or interference by the Forest Service (Stathem, R 1162). There was also another disadvantage, which everyone conceded, namely, that the road would be open to the public (Cameron, R 1275; Howell, R 1374). Thus the danger to and conflicts with public use, the dangers involved in logging, resulting from lack of control of the road system, became a substantial factor of value.

It was Scott's testimony that the control of the road system was most important (R 21) and without such control the remaining property could never be sufficiently managed (R 29). The severe nature of the terrain on Sec. 31 made the use of the roads neces-

sary as landing and skidding areas (R 21) and under such conditions the presence of the public would make it extremely dangerous as well as subjecting Scott to extensive liability. In point of fact, the use of the road system by anyone else at the same time as logging occurred would be impossible (R 1224). Yet Scott no longer had this control with regard to its timber on the remainder of Sec. 31.

The Government admitted early in the trial that a prospective purchaser of Sec. 31 would be interested in determining "If I bought this property what would you [the Forest Service] allow me to do on this easement" (R 177). Mr. Stathem stated that in his opinion there would be no restrictions as to the owner's utilizing the road in the same manner as before, including the necessary landing and skidding areas (R 1162). He also stated that there would be no charge for the use of the road (R 1164). Later however, he altered his testimony to say that there would be a maintenance charge (R 1164). There were further requirements before a user could even obtain a Special Use Permit. First, it must first qualify as a commercial user (R 1203). Next it must post a bond so that if it does not have the money or is not able to perform the maintenance, the Government will have the money to do it for it (R 1165). It must be presumed that the Government policy is not, nor is Mr. Stathem's opinion, binding forever. The risk as to the future is clearly apparent.

The Government witnesses simply assumed that by placing a few signs [two] at intersections of the Special Service Roads that control would result. It was Mr. Stathem's testimony that he could personally restrict the road's usage (R 1157, 1204; Howell R 1369; Cameron, R 1272; Linville R 1433). Mr. Stathem nevertheless, testified that the permit, the Special Use Permit, spells out the requirements of use (R 1203).

A typical Special Use Permit issued by the Forest Service by Mr. Stathem dated June 5, 1959, (or within a year prior to the

taking), was put in evidence as Exhibit 3. This was offered by the Government as being a typical example (R 237, 240), and Mr. Stathem testified that the basic concept of Special Use Permits did not change (R 1205-6). It repudiated the concept that Scott could evermore use the condemned road for logging as it wished. For it stated at Section 15: (R 1206)

"This permit may be terminated upon breach of any of the conditions herein, or at the discretion of the Regional Forester or the Chief, Forest Service."

Nowhere in Exhibit 3 is there any authorization for a commercial user to put up signs limiting the use of the road, and there is no obligation upon the Forest Service to do so, and no way of requiring it to do so. Mr. Stathem's testimony was designed purely to limit damages and ignored the admitted Special Use Permits required to be used. Yet, the Trial Court did not comment upon this contradiction, or indicate its speciousness.

Moreover, the Government valuation expert (Howell, R 1376) ignored Paragraph 31 of the regulations defining the use of the Special Use Permits. It provides:

"After construction operations have been completed this road shall be open at all times to the free use of the public."

This printed provision of the Special Use Permits completely disposed of the "expert" testimony of the Government and substantially supported Scott's experts. Obviously, if the road is kept "open at all times to the free use of the public", the commercial user cannot close it for his private reasons.

No reasonable prospective purchaser would fail to take into consideration the effect of the clear warnings provided in Special Use Permits. These would not only affect its commercial operations but even its rights to remove the timber on his own land could be subject to arbitrary cancellation at the discretion of the Forest Service. Yet the language was ignored by the Government's

valuation experts. Again the Trial Court undertook no comments on this portion of the case where the Government's witnesses ignored pertinent facts, nor was their testimony stricken because they had failed to take into account these obvious facts.

THE TIMING OF THE STRIKING OF DEFENDANT'S VALUATION TESTIMONY AND THE INSTRUCTIONS BROUGHT ABOUT AN UNEXPLAINED DIVERGENCE AND THIS IS ERROR

As has been demonstrated earlier herein (*supra*, p. 20) in commenting on the evidence the Trial Judge referred only to the testimony of Defendant's valuation experts (R 1662-1668). This was done with finality and ictus and the Court concluded: (R 1668)

"So that is the status of the testimony and the evidence as I now rule on it."

These rather extended remarks were so inflammatory and so prejudicial that counsel for Defendant immediately objected: (R 1669)

"Your Honor, I would like you to advise the jury that I do not concur in your rulings; that I have objected to them; and that I consider them highly prejudicial to my case."

At this point the jury could not have avoided the feeling that all of the Defendant's witnesses were subject to this castigation and that it should view the remaining testimony, if any, with suspicion. This was further enhanced and fed by the Trial Court's later instruction: (R 1681)

"This means that in order to find just compensation here equal to the evidence submitted to you by the Defendant or the witnesses for the Defendant this evidence must have greater weight in your estimation and more effect than that submitted to you by Plaintiff and its witnesses."

The sum and substance of this situation was to compel the jury to disregard all of the testimony not only of Wall and Sanders, but the remainder of Defendant's witnesses, or to cast such suspicion that the testimony could not attain the degree of believableness which would sustain Defendant's burden. While the Court made it very plain in the instructions that only the valuation testimony was to be ignored, that was the only issue left in the case. The right of the taking had been decided. Further, the testimony of other witnesses for Scott was designed to support the valuation experts not to supplant it. Indeed, the timing of denouncement just before the instructions, and the generality of the instructions inevitably would lead any jury to believe it must disregard all of Scott's testimony. This is precisely what the jury did—in a matter of a very short time.

Where the Court submits the evidence and the theory of one party prominently, it is reversible error to fail to accord the position of the other side in equal prominence. *State Automobile Mutual Ins. Co. of Columbus v. York*, 104 F.2d 730, cert. den. 308 U.S. 591, 87 L.Ed. 495 (CCA NC, 1939); *Home Ins. Co. N.Y. v. Consolidated Bus Lines*, 179 F.2d 768 (CCA W.Va., 1950); *Pullman v. Hall*, 46 F.2d 399 (CCA W.Va., 1931).

IT WAS ERROR FOR THE TRIAL COURT NOT TO INSTRUCT THE JURY WITH RESPECT TO CRITICAL ISSUES, THE FAILURE OF WHICH WAS BOUND TO RESULT IN A MISCARRIAGE OF JUSTICE

The Court erred in failing to instruct the jury with respect to critical issues in this case, the failure of which was bound to result in a miscarriage of justice. These critical points are as follows:

(a) That Sec. 31 was owned in fee by the Defendant, Scott Lumber Company, at the time of the taking.

(b) That in the determination of value, the prospective purchaser could be other than the "cut out and get out" timber buyer not interested in owning land or timber land.

(c) That the Government's valuation experts did not take into account one of two types of prospective purchasers and based their valuation figures only on depletion cutting.

(d) That the highest and best use of Sec. 31 was for the production and management of timber which could not be accomplished by depletion cutting.

(e) That the Government witnesses were not qualified to express any opinions as to the most profitable use of Sec. 31, and that figures based upon the most profitable use are valueless.

(f) That the loss of a controlled road, replaced by a Special Service Road where the public cannot be excluded, is an element of damage for which Defendant should be compensated.

Appellant makes no claim nor pretense here that instructions involving any of the above points were submitted to the Trial Court at any time. It does point out that in the final analysis it is the Trial Court which determines what instructions are to be given and how. If proper instructions are not given then the jury cannot render an accurate or fair verdict. It may be true that the failure to give a specific instruction is not a matter which can be raised on appeal. However, such omissions were proper on the consideration of the Motion for New Trial and the insufficiency of the Trial Court in not giving correct instructions was bound to result, as it did, in a miscarriage of justice and the failure to grant Appellant just compensation. The failure to grant a New Trial is a proper issue for appeal.

CONCLUSION

In any condemnation case it is most obviously a proceeding of the Government, by the Government and for the Government. Particularly in this case, the overwhelming force and power of the Federal Government was directed against a single member of

the public, Appellant, Scott Lumber Company. The courts have a particular duty in the protection of citizens, to see that the power of condemnation is properly exercised, and that just compensation is made pursuant to a fair and impartial trial.

From the very outset of this case one receives the strident attitude that the Government need not justify the taking of private land, and that adequate compensation is whatever the Government feels should be paid, supported by the testimony of experts hired for this purpose. The patronizing attitude of the Government in this case was indeed shocking. Its Motion to Determine a Preliminary Legal Question was converted to Summary Judgment at its request after a favorable decision on the Motion. This in spite of the situation that there was a very marked dispute on the facts and the propriety of the taking, which should have been left for the trial. Summary Judgment under the circumstances was wholly improper.

The same dominance was encountered at every stage during the trial on the only question allowed to go to the jury, that question of just compensation. The Trial Court completely ignored the stipulation of the parties set forth in the Pre-Trial Order without in any way protecting the rights of Appellant, Scott. Nor can it be convincingly stated that the disregard of the Pre-Trial Order was inadvertence. The conflicts with the Pre-Trial Order were pointed out by Scott in its Motion for New Trial. In the denial of this Motion, the Trial Court adhered to its repudiations of the stipulations of the Pre-Trial Order. Furthermore, it used these variances to strike down Appellant Scott's valuation testimony at a time when all of the testimony was in and each party had rested, so that it was impossible for Appellant Scott to be protected in any way. In addition, throughout this Brief it has been pointed out how the Trial Court applied one set of standards to Appellant's valuation witnesses and a different set of standards for the Government's valuation witnesses, leaving Appellant Scott

without any valuation testimony whatever and leaving the jury only the choice as to which Government expert to believe. The errors were so many and so devastating to Scott that a proper determination of just compensation was rendered impossible. Accordingly, this case should be reversed and remanded for a new trial.

Respectfully submitted,

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I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19^{and 39} of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY GIFFORD HARDY

(Appendix Follows)



Appendix A

DEFENDANT-APPELLANT'S EXHIBITS

In Re: Scott Lumber Company, Inc. v. United States

Volume 1

Exhibit	Identified	In Evidence	Description
A		15	United States Department of Agriculture, Forest Service Map Shasta National Forest (southern half) California Mt. Diablo Meridian 1954.

Volume 2

B	103	108	Photograph of Sec. 31 taken 9-6-1961.
C	111	117	Photograph taken 11-9-1961 on the southern road identified as Parcel 3 in the Government taking at the western boundary Sec. 31.
D	112	119	Photograph of the southern entrance to Parcel 3 taken 11-19-1961.
E	112	122	Photograph of the eastern entrance to Scott property on Parcel 2 taken 11-10-1961.
F	112	123	Photograph taken 11-8-1961 of the eastern entrance to Parcel 1.
G	132	132	Logging plan map prior to May 18, 1960.

Volume 3

H	243	Withdrawn 265	Letter dated 11-20-1964 from Southern Pacific Land Company to Mr. Toler.
I	304	304	Sanders Sales Map.
J	314	314	Large Sales Map.

Volume 4

K	381		Timber Sales Charts.
L	444		Factor Chart.
M	580	Withdrawn 648	Letter to Mr. Berry dated 6-5-1962 from W. H. Thomas Associates.
N	625	625	Photograph of bank.
O	626	626	Photograph of the bank taken 11-5-1964.
P	628	628	Photograph of a leaning tree taken 11-10-1961.
Q	632	632	Photograph of the road before taking.
R	633	633	Photograph after taking of the road substantially as it will be when the Government finishes its construction, taken 11-5-1964.

Exhibit	Identified	In Evidence	Description
S	637	637	Photograph of the former landing area before the taking.
T	643	644	Photograph of the culvert hole.
U	645	645	Document showing the condition of the road before the taking.
Volume 6			
V	649	654	Photograph of the old road Parcel 2, taken 11-10-1961.
W	654	658	Photograph of landing number 19B, Parcel 2 of the new road, taken 11-5-1964.
X	658	658	Photograph of the old road, Parcel Number 3 taken 11-9-1961.
Y	689		Pictures and report file of Sec. 31 of George W. Berdan.
Y-1	}		Photographs of Exhibit Y each numbered separately. These are referred to in Volume 9. Photographs taken 11-28-1964. Identified and In Evidence as follows:
Y-2			
Y-3			
Y-4			
	1083	1086	
Volume 7			
Z	769		Timber Sales Map of Myron Wall.
AA	791		Report dated 11-25-1964 addressed to Mr. William H. King from James W. Prochnau.
BB	859		Report dated 11-23-1964 to Scott Lumber Company (I. E. Toler) from Mr. Jack Brewen.
Volume 8			
CC	864		Report to Scott Lumber Company from George Berdan (undated).

PLAINTIFF-APPELLEE'S EXHIBITS

In Re: Scott Lumber Company, Inc. v. United States

Volume 1

1	72	76	Deed from Watt and Lamm to Scott Lumber Company.
2	75	76	Deed from Southern Pacific Land Company to Deschutes Lumber Company.

Volume 2

3	237	240	Forest Service Special Use Permits dated June 5, 1959 and September 20, 1955, with amendments, to Scott Lumber Company.
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Volume 6

Exhibit	Identified	In Evidence	Description
4	717	719	State of California Fire Protection Map by Agencies—as revised 1963.

Volume 9

5		1132	Map of the Shasta-Trinity National Forests Area.
6		1144	Map of portion of Big Bend Working Circle.

Volume 10

7	1158	1159	Photograph of sign.
7-A	1158	1159	Photograph of truck.
8	1170	1171	Photograph of portion of Sec. 31 taken in November of 1959.
8-A	1170	1171	Photograph of portion of Sec. 31 taken in November of 1959.
9	1176	1177	Fire Causation Chart.
10	1262	1263	Mr. Howell's Sales Market Map.

Volume 11

11	1414	1415	Linville Sales Map.
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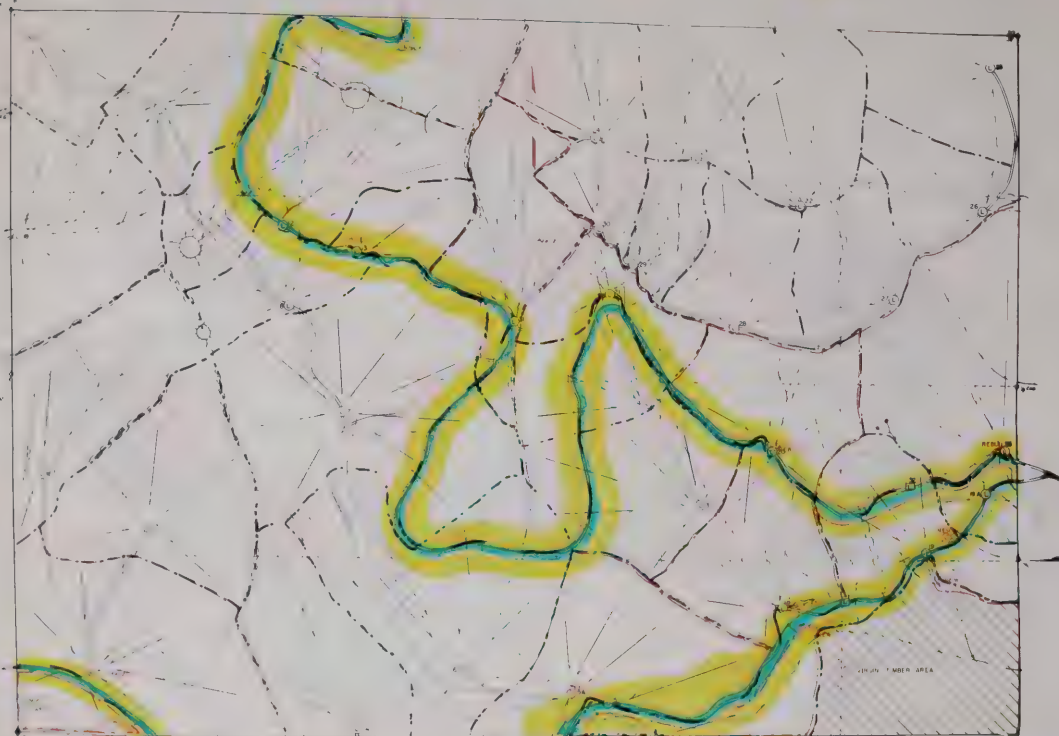
TOWNSHIP 37N RANGE 2E, Section 31 LOGGING MAP OF SCOTT LUMBER COMPANY, Inc. PROPERTY

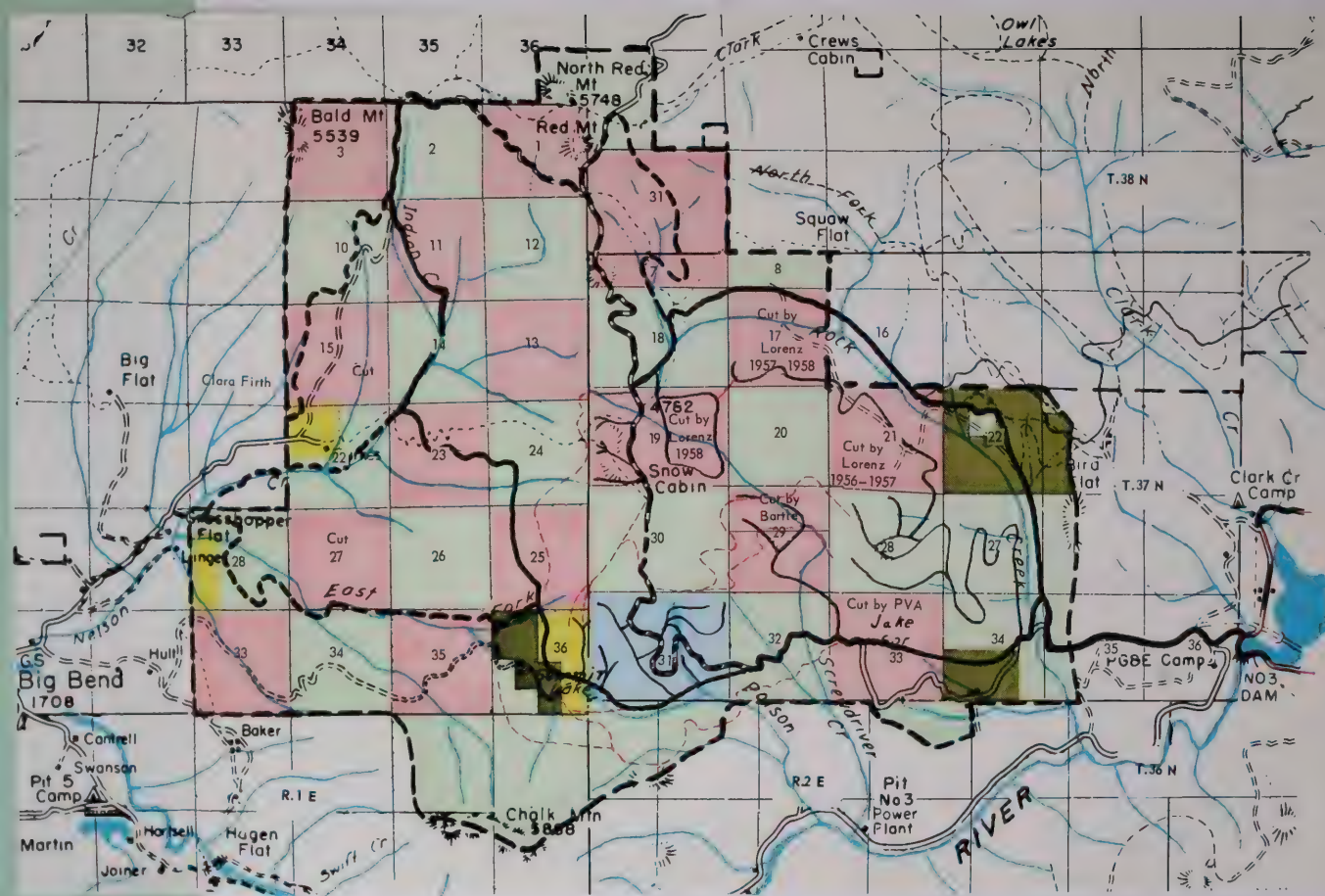
- Ridge
- Saddle or Pass on Ridge
- Knob
- Draw
- Spring

- Existing Road Along Condemned Strip
- Spur Logging Roads
- Fire Lane and Land Management Roads
- Landing Site and Landing Numbers
- Proposed Landing Site Never Constructed

- Skidding Boundary
- Log Skidding Direction
- G.L.O. Section Corner Found
- G.L.O. Quarter Section Corner Found
- U. S. Forest Service Road R/W Easement

- Spur to be Constructed
- New and Rebuilt Landing Locations
- Spurs to be Constructed
- Skidding Boundary
- Danger Tree Strip





IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT LUMBER COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

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MAY 1 1967

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<u>Kinter v. United States</u> , 156 F.2d 5 -----	19
<u>Morton Butler Timber Co. v. United States</u> , 91 F.2d 884 -----	19
<u>Olson v. United States</u> , 292 U.S. 246 -----	26
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,993

SCOTT LUMBER COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court's memorandum sustaining the Government's authority to condemn easements across appellant's land appears at pages 153-159 of the transcript of record; its memorandum denying appellant's motion for new trial on the issue of compensation is set forth at pages 236-253 of that record. ^{1/}

^{1/} To avoid confusion, we follow appellant's practice (Br. 2) of referring to the transcript of record prepared by the clerk as "Tr." and to the reporter's transcript as "R."

JURISDICTION

The jurisdiction of the district court over this condemnation action is founded on 28 U.S.C., sec. 1358. Final judgment was entered January 7, 1965 (Tr. 207). Appellant's timely motion for new trial was denied December 28, 1965 (Tr. 253). Notice of appeal was filed February 15, 1966 (Tr. 254). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the district court correctly entered summary judgment sustaining the Government's right to condemn, as a matter of law, where the only contested factual issues pertained to the necessity for condemnation.
2. Whether the district court erroneously departed from the pretrial order in striking the valuation testimony of one of appellant's witnesses.
3. Whether the district court erred in ruling, on appellant's motion for a new trial, that the valuation opinions of the Government's witnesses were based on permissible assumptions.
4. Whether there was error in the district court's comments and instructions to the jury.

STATEMENT

This condemnation proceeding was instituted by the United States to acquire easements across appellant's timber-land "for the construction, maintenance, and permanent use of highways for the purpose of removing timber and other products from the Shasta-Trinity National Forests and for use in the conservation, preservation, protection and general administration of said forests, and for all other lawful purposes" (Tr. 2). The immediate area involved is, in general, owned (alternately by sections) by the United States and private interests (R. 18; Br. 11). The easements condemned (on 23 acres) embraced existing timber-hauling roads across a section of land (Section 31) owned by appellant and extended for a short distance on each side of the roads (Exhibit G).^{2/} The existing roads which varied in width from 9 to 16 feet had been built by the United States Forest Service in 1929 or 1930 (R. 224, 1153). The additional strips condemned on each side of those roads were for widening the roads up to a 26-foot width and for appropriate safety zones (R. 1155-1156; Exhibit G).

^{2/} Because the existing roads, although connected, crossed appellant's land in three segments, the areas taken, embracing these segments, were denominated Parcels 1, 2 and 3, respectively, in the condemnation complaint (Tr. 4, 6, 7). The section of land owned by appellant contained 897 acres (R. 220).

The land involved is mountainous and deep within the external boundaries of the national forest. The old, existing roads and their connections with roads on other properties (federal and private) were used by appellant and others in the area to haul timber out to mills for processing. The new roads to be built by the Forest Service, pursuant to this acquisition, would be considerably wider and give better access to the Government's timberlands. In addition, a purpose of the new roads "was to assure not only ourselves [Forest Service] but the private owners that there was ready, undeniable access through this area from one end to the other. The problem, as far as the Forest Service is concerned, is that we will not sell Government timber until there is public right of way so you'd have a free and unrestricted competitive bidding" (R. 1148). Otherwise, owners of roads on private lands can and do set their own prices for allowing timber to be hauled over them (R. 1148).

The United States filed a declaration of taking at the time of the filing of the complaint in condemnation (May 18, 1960), with a deposit into court of estimated just

compensation (Tr. 153). Thereupon, the district court entered an order for delivery of possession (Tr. 153-154). The litigation then proceeded in two phases:

First, by answer to the complaint and by motion to vacate the order of possession with numerous affidavits, appellant challenged the authority to condemn, alleging that the Government did not need an unrestricted easement which would allow the general public to use the roads and that its property was not being taken for a public use, but to benefit other (competing) private timber operators in the area in hauling out timber from Government lands (Tr. 50-51, 153-155). Accordingly, it alleged that there was no statutory authority for the taking. In response, the Government, by motion for an order determining a preliminary legal question, urged the court to rule on whether the taking was within the legislative authority set forth in the complaint and declaration of taking (Tr. 137). Its stated position was that, if the taking was authorized by that statutory authority, then appellant's allegations, which relate solely to the necessity for the taking, must fail as a matter of law. The district court ruled

(a) that, as conceded by appellant, "a taking for a road on which to haul Government timber would ordinarily be classified as a taking for a public use," (b) that the court lacked the power to determine the quantum or location of the estate to be taken as sought by appellant and (c) that the fact that building the new road would open up heretofore inaccessible areas of (competing) private timberland, as well as Government timberland, and would make it possible to haul such timber to a particular private mill do not tend to show that the taking is arbitrary, capricious, in bad faith or for private purposes, but relate, rather, to forest management purposes which are matters exclusively for the Forest Service, not the courts, to determine (Tr. 153-159).

On this basis, the court on March 23, 1961, granted the Government's motion for an order determining the preliminary legal question (that the taking is for a public purpose) and denied appellant's motion to vacate the order for possession (Tr. 158). Then, the court deeming that this result called for summary judgment on that issue entered such a judgment on March 31, 1961, sustaining the authority to condemn (Tr. 160). It held that there was no genuine issue of material fact bearing on the matters resolved, that the

purpose of the taking alleged in the complaint was clearly a public use and that the charges of arbitrary action or bad faith in the record cannot (as a matter of law) upset the executive determination as to the necessity for the taking 3/ for a clear public purpose.

The second phase of the litigation related to the issue of just compensation. At the outset, the parties stipulated that the value of the timber taken within the easement area was \$21,809 on May 18, 1960, the date of taking (Tr. 239). This left for the jury the determination of the monetary loss in market value, if any, to appellant's land as a result of the imposition of this new road easement, excluding the timber loss.

Appellant offered the valuation testimony of two witnesses, Sanders and Wall. But, on motion by Government counsel, following their testimony, the court struck their valuation opinions because the basis for their opinions was legally erroneous for reasons to be discussed in the Argument (Tr. 243). The court noted that Sanders admitted that he made

3/ The court viewed the "facts alleged by Scott, taken in the light most favorable to Scott" (Tr. 155).

no effort to investigate forestland or forest land and young growth timber (Tr. 243). Rather, he constructed a value by addition and subtraction of component parts or "assets." Part of these additions and subtractions were based on pure speculation (Tr. 243). He did not value the whole which was taken, but made a summation of estimated values of the parts (Tr. 244). The court allowed him to return and value the timber alone, provided his figure would be used by another expert in an over-all valuation. But no other witness made use of this valuation, so that figure was stricken. The witness Wall, the court noted, made numerous erroneous assumptions and omissions which admittedly had important bearing on value (Tr. 245-246). The court concluded that his valuation would be confusing rather than helpful to the jury (Tr. 245).^{4/}

The Government's two valuation witnesses testified (Tr. 242) that, if timber on the easement area were to be excluded from the over-all value because of the stipulated figure for it of \$21,809, then appellant should receive \$591

^{4/} To avoid repetition, further details concerning the exclusion of the valuation opinions of these witnesses are set out in the Argument, infra.

(Linnville) or \$691 (Howell) as a result of loss of control of the private road because of the taking. The jury returned an award of \$691 (Tr. 206) which gave total compensation in the sum of \$22,500 (\$691 plus \$21,809). Judgment was entered in that amount (Tr. 207) and thereafter a motion by appellant for a new trial, extensively briefed and argued, was denied (Tr. 217-253). This appeal followed (Tr. 254).

SUMMARY OF ARGUMENT

I

The district court correctly entered summary judgment sustaining the Government's authority to condemn as a matter of law. The taking of property within the external boundaries of a national forest for a road on which to haul government timber and for forestry management purposes is a public use and is authorized by statute. Appellant's factual allegations pertaining solely to the wisdom for the taking presents nothing for a court to determine. That is exclusively an administrative matter. The fact that the taking of property from one party may bestow a benefit on another private party is of no legal significance.

II

A. The district court did not erroneously disregard the pretrial order. Appellant contends that the court erred in permitting and requiring consideration of the right of the Southern Pacific Land Company to use the existing road over appellant's land, because the pretrial order, while specifying another such interest, did not specify that interest. But appellant did not object at the trial to a showing of Southern Pacific's right. There was no surprise. Clearly, it was not the intention of the parties in settling the pretrial order to have definitively set forth the status of the title to the exclusion of several known, claimed interests.

B. The Government's valuation witnesses did not make erroneous assumptions.

1. The record is clear that the valuation opinions by the Government's witnesses, based on immediate harvest of the merchantable timber, was not in violation of the California Forest Practice Act.

2. Their valuations on the basis of "the highest and most profitable use" of appellant's property was correct and is the same standard, in federal condemnation law, as "the highest and best use" urged by appellant.

3. The Government's valuation witnesses weighed proper factors in considering the extent of the use that appellant and others could make of the new Forest Service Roads.

III

There was no error in the district court's comments and instructions to the jury. They were correct and in all respects fair. There were no essential omissions. Appellant's failure to request or object to instructions before retirement of the jury is clearly fatal to its present attempt to urge error as to the instructions.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT SUSTAINING THE GOVERNMENT'S RIGHT TO CONDEMN

Appellant contends that the district court erred in entering summary judgment sustaining the authority of the

United States to condemn its property in this case, because there were genuine issues of material facts as to whether the taking was for a public purpose (Br. 10-11, 14).^{5/} Appellant then proceeds to assert facts and conclusions from those facts, as it did in affidavits and other papers below, which, it contends, raise factual issues that should have been resolved (Br. 11-14). The "facts" asserted seek to show (1) that the Government's building of the new road will benefit appellant's competitors in the area and (2) that "condemnation was not necessary either to build a road or to move Government timber over the road * * * the existing road system was adequate for these needs" (Br. 12-13).

But, as the district court said (Tr. 154): "It is conceded by Scott that a taking for a road on which to haul Government timber would ordinarily be classified as a taking for a public use. That is the avowed purpose of the taking in this case." The complaint so stated (Par. 3 at Tr. 2) and ample congressional authority to condemn for this purpose was

^{5/} Appellant states that the case "should have gone to the jury for a determination as to whether the taking was for a private purpose" (Br. 14). But Rule 71A(h), F.R.Civ.P., governing federal condemnation trials, after providing for trial by jury or commission of the issue of "just compensation," states: "Trial of all issues shall otherwise be by the court." Hence, under any view, this issue should not have gone to the jury. United States v. 91.69 Acres in Oconee County, 334 F.2d 229 (C.A. 4, 1964).

alleged (Tr. 1-2). Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; Act of June 4, 1897, 30 Stat. 34-36, 16 U.S.C. secs. 475 and 476; Act of August 27, 1958, 72 Stat. 885, 906-907, 23 U.S.C. secs. 203 and 205; Act of June 23, 1959, 73 Stat. 92, 103-105. It is clearly a constitutional purpose. U.S. Constitution, Article IV, sec. 3, cl. 4.

The facts and conclusions sought to be litigated by appellant pertain exclusively, in one form or another, to the need of the Government to condemn appellant's property for this purpose. But as the Supreme Court said in Joslin Co. v. Providence, 262 U.S. 668, 678 (1923):

That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. Adirondack Ry. Co. v. New York [176 U.S. 335], 349; Shoemaker v. United States, 147 U.S. 282, 298; United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 685; Boom Co. v. Patterson, 98 U.S. 403, 406. * * *

The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

See also Berman v. Parker, 348 U.S. 26 (1954); U.S. ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946); Rindge Co. v. Los Angeles, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919).

Where a valid public purpose is stated by the administrative officer to whom Congress had delegated a particular program or function to effectuate that purpose and his actions will or can serve that purpose, the courts cannot inquire into his intentions in order to find a different purpose. Southern Pacific Land Company v. United States, 367 F.2d 161 (C.A. 9, 1966), cert. den., 35 Law Week 3392; United States v. Montana, 134 F.2d 194, 196-197 (C.A. 9, 1943), cert. den., 319 U.S. 772; City of Oakland v. United States, 124 F.2d 959, 964 (C.A. 9, 1942), cert. den., 316 U.S. 679. The fact that the taking of property from one party may bestow a benefit on another private party is of no legal consequence. Berman v. Parker, 348 U.S. 26 (1954); United States v. Marin, 136 F.2d 388 (C.A. 9, 1943); United States v. 243.22 Acres of Land in Babylon, N.Y., 129 F.2d 678, 683 (C.A. 2, 1942), cert. den., sub nom. Lambert v.

United States, 317 U.S. 698. Appellant's charges of "arbitrary and capricious" actions come to no more than disagreement with the administrative decision. Cf. Chapman v. Public Utility District No. 1 of Douglas Co., Wash., 367 F.2d 163 (C.A. 9, 1966).

It is undeniable that these new roads give access or improved access to government timberlands and serve forestry management purposes. Hence, they serve a public purpose authorized by Congress. Appellant's desire for a different administrative determination respecting the necessity for acquiring its lands on which to construct them presents nothing for court review. Accordingly, summary judgment was correctly entered.

II

THERE WAS NO ERROR IN THE DISTRICT COURT'S RULINGS ON THE TESTIMONY OF THE VALUATION WITNESSES

Introductory: Appellant states in its brief (p. 43):

"From the very outset of this case one receives the strident attitude that the Government need not justify the taking of private land, and that adequate compensation is whatever the Government feels should be paid, supported by the testimony

of experts hired for this purpose. The patronizing attitude of the Government in this case was indeed shocking." The fact of the matter is, as stated by government counsel during argument on appellant's motion for a new trial on the valuation issue (Reporter's Transcript on Motion for New Trial, pp. 102-103):

We spent three weeks of trial in this [valuation] matter of which the Government utilized only two and one-half days. The Court, I think, was overly lenient with Defendant and its counsel in allowing time and again efforts to introduce evidence in support of their so-called valuation of just compensation, and we allowed the witnesses to come back time after time in an effort to do this, and we did many things that I think were not required of the Court nor required of counsel for the Government in order to allow some evidence to remain for the Jury to have by way of valuation testimony on behalf of the Defendant. The fact that they were unsuccessful in accomplishing this is in no way the fault of the Court or counsel for the Government, and I feel that merely because the experts introduced on behalf of the Defendant were improperly informed or followed a legally impermissible approach and were not allowed to render their final opinion does not per se entitle these defendants to a new trial. They have had more than their day in Court
* * *

In short, the case is simply an attempt by appellants to create a claim to substantial compensation where the conversion of a private road to an improved public road caused no loss to appellant.

A. The Rulings with Respect to Appellant's Valuation Witnesses.

Appellant makes a repeated reference to the district court's striking of the valuation testimony of its witnesses, Sanders and Wall (Br. 4, 6, 24, 41), but only argues one ground of criticism of that action; namely, the court's alleged disregard of a pretrial order -- with respect to the testimony of Wall (Br. 14-23).^{6/} Before dealing with that contention, it should be observed that the court relied on numerous other independent bases for striking the valuation conclusions of Wall (Tr. 245, 247; R. 1108-1116, 1529-1542, 1581-1582, 1596-1605, 1662-1666). These related principally to matters forming the basis for his opinion which had no foundation whatever in objective facts. As the court said, he was "using

^{6/} Appellant's quarrel with the court's instructions to the jury (Br. 40-42) do not bear on the validity of the court's striking the valuation testimony of these two witnesses and will be dealt with later.

anything anybody would suggest to him as being a good idea rather than his determining what a prudent purchaser would really have in mind on the day that he made the purchase" (R. 1600). To mention but one instance, he included in his land valuation calculations the sum of \$37,500 as a "contingency item" for "unforeseen expenses and costs" that would result from the condemnation (R. 866-867, 1035-1037). This was pure unsupported speculation and conjecture pulled out of the air (R. 1531-1532, 1585-1587, 1602-1603). As the court said of his testimony generally (R. 1581): "I was frankly disturbed as we [went] through with his examination to find him saying time after time, 'No, I didn't investigate that. No, I didn't look into that. No, I didn't talk to those people,' and so forth." Appellant does not raise and, hence, apparently concedes the validity

of this and the other grounds (except the pretrial order)
for excluding his valuation conclusions.^{1/}

Appellant's argument (with respect to Wall)
asserting a disregard of the pretrial order lacks merit.
The pretrial order recited that appellant owned the fee
simple title to Section 31 "subject, however, to certain
easements and rights of way vested in Defendants, R. G. Watt

^{1/} Appellant presents no argument at all about the validity
of striking Sander's valuation testimony. The court
leaned over backwards trying to have this witness lay a proper
foundation for expressing an opinion of value. He was re-
peatedly allowed to be recalled for that purpose (R. 272-455,
537-603), but could never establish an existing or acquired
knowledge of land values in the area (R. 455-537, 1095-1104;
Tr. 243-245). In addition, as the court said (R. 378): "He
takes the before value and then he merely deducts the assets
that he thinks have been taken away and throws some costs in
there." That is not an acceptable appraisal of market value.
Finally, in an ultimate effort to allow his testimony to be
used, the court permitted him to testify to the value of the
timber alone, provided some over-all appraiser would later
make use of his figures (R. 537-603), but since no appraiser
did, that testimony had to fall, because in federal eminent
domain proceedings land must be valued as a unit (R. 1666-
1668). It may not be valued as a total of its parts (Tr. 243-
245). Morton Butler Timber Co. v. United States, 91 F.2d 884
(C.A. 6, 1937); United States v. Meyer, 113 F.2d 387, 397
(C.A. 7, 1940), cert. den., 311 U.S. 706; Fain v. United States,
145 F.2d 956, 958 (C.A. 6, 1944); Kinter v. United States, 156
F.2d 5 (C.A. 3, 1946).

and Alice McCourt Lamm" and that they "have previously appeared in this proceeding and have disclaimed any further interest in the estate condemned and in the amount to be awarded for the taking herein" (Tr. 195, 239). Because of that specific reference to the Watt and Lamm interests only, appellant urges that it was error for the court to permit the Government to show by deeds (Exhibits 1 and 2) that the Southern Pacific Land Company also had a reserved right to use the logging roads across appellant's land and, further, it was error for the court to use Wall's lack of knowledge of that right as one of the many grounds for excluding his opinion of value. The harm to the theory of appellant's case in this respect arose from the fact that appellant sought to show that, before the taking, it had virtually complete control of its roads so that it could block them, pile logs upon them, etc.; whereas, after the taking, it lost this allegedly valuable right. The existing rights of the Southern Pacific Land Company, in addition to those of Watts and Lamm, to use the roads diluted this exclusivity and, hence, had a bearing on that theory of value asserted.

As grounds for error, appellant urges surprise, an inability to cure the omission by Wall because his testimony and the striking of it came at the end of appellant's case, and failure of the court to impose protective terms when it thus departed, as alleged, from the pretrial order. But, as the district court said (Tr. 247): "If there had been objection at the time of trial, then the matter could have been dealt with at that time. If convinced that defense counsel was surprised, then possibly a protective order could have been made as suggested by defendant's memorandum." ^{8/} The interest of Southern Pacific came up on the first day of the three-week trial and the deeds showing the reservation were received in evidence at that time with no objection (R. 66-84; Tr. 241, 247). Mr. Wall was not called on until the ninth day after that (R. 745).

In any event, there was no departure from the pre-trial order. The record is clear (Tr. 238, 247, fn. 1) that

^{8/} This subject was not specified in appellant's motion for a new trial and was not raised in appellant's opening memorandum supporting that motion. It was an afterthought even subsequent to that (Reporter's Transcript on Motion for New Trial, pp. 98-99; Tr. 241).

the reason for specifying the Watt-Lamm interests in the pre-trial order was a request from their attorney for "the pre-trial order to spell out a little more explicitly that the taking herein does not operate to extinguish the right of way interest of the Watt-Lamm people * * * in the event the Government does abandon its right of way." They disclaimed "any and all right, claim or interest they may have in and to the compensation or any part thereof to be awarded for the estate and interest taken in this proceeding, or for any damages incident thereto," but wanted their reversionary interest to remain (Tr. 193e, 238-239). This was taken care of by an amended complaint preserving all reversionary rights (Tr. 193c, 238).

The pretrial order does not state that theirs was the only interest to encumber appellant's title. Any statement that it was the only interest would have been untrue on the face of the record, because Southern Pacific Land Company had previously filed the disclaimer specifically asserting its interest in the property but waiving any right to a portion of the condemnation award (Tr. 188). There were also other defendants with known interests in the roads who

waived compensation (Tr. 240). The memoranda filed by both the Government and appellant prior to the pretrial hearing made no mention that condition of title would be a subject of discussion at the hearing (Tr. 190, 193a, 248). The Government's memorandum merely stated that it was anticipated that the Watt-Lamm interests would be settled before the pretrial hearing (Tr. 192, 248). It is not sensible to believe that the parties intended to set forth in the pre-trial order all outstanding interests in these circumstances. Accordingly, we submit that there was no error in the district court's ruling.

9/ Unlike appellant (Br. 20), we espouse rather than depreciate the court's statement that the opinion of an "expert witness is only as good as the reasons that back it up." "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts on which it is based." State of Washington v. United States, 214 F.2d 33, 43 (C.A. 9, 1954), cert. den., 348 U.S. 862. " * * * an opinion is no better than the hypothesis or the assumption upon which it is based." International Paper Co. v. United States, 227 F.2d 201, 205 (C.A. 5, 1956). "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." United States v. Honolulu Plantation Co., 182 F.2d 172, 178 (C.A. 9, 1950), cert. den., 340 U.S. 820; Atlantic Coast Line R. Co. v. United States, 132 F.2d 959, 963 (C.A. 5, 1943).

Contrary to appellant's implications (Br. 19-20), there is no evidence that Southern Pacific's easement was not in full force as shown in the deeds (R. 1663-1664). An understanding of appellant's employees that "the Southern Pacific easement had been cleared away by the title company" (Br. 19) is not such evidence.

B. The Rulings with Respect to the Government's Valuation Witnesses.

1. The California Forest Practice Act. Appellant contends that the district court erred in permitting the Government's witnesses to give valuation opinions based on "cut out and get out" timber harvesting in violation of the California Forest Practice Act (Br. 24-29). It must be noted here that the term "cut out and get out" is a term coined by appellant's counsel and was never used by any of the Government's witnesses. Appellant implies from this term that the Government's witnesses were suggesting that the purchaser of this property should "clear cut" the timber. "Clear cutting" means to cut the timber indiscriminately without reference to its size or merchantability. This practice is in violation of the California Forest Practice Act. The record in this case clearly demonstrates that neither Mr. Howell nor Mr. Linville testified that they were of the belief that a purchaser of this property could or would "clear cut" the land. On the contrary, both witnesses referred to and relied upon Mr. Bunting's timber cruise and valuation of Section 31 (R. 1257, 1294-1295, 1299, 1420-1421, 1456) -- a copy of which was furnished appellant prior to trial (Tr. 192) - wherein

Mr. Bunting conducted a cruise of and expressed his opinion as to the value of the "merchantable timber," i.e., that timber which could be cut in accordance with the general practice in the area and the pertinent California laws. This cruise was the same type of cruise conducted by Mr. Sanders and the one used by Mr. Wall (appellant's witnesses). The matter is made crystal clear by the statement of Chief Forester Stathem (R. 1193): "You could cut down to the allowable limits within the State Forest Practices Act and this would, in my mind, be by far the most profitable use of this section" (Cf. R. 1172, 1277-1278).

It is true that the Government's witnesses appraised the property on the basis of a "full cut" or immediate harvest. But that does not mean a harvest in violation of law. It was their opinion that the "highest and most profitable use" of the property -- the use which gave it the greatest value in the market -- was a purchase for immediate harvest of the merchantable timber.

2. The Most Profitable Use. Appellant's criticism of the Government's witnesses and the court (Br. 29-37) on the quibble that "highest and most profitable use" is not the

same in federal condemnation law as the "highest and best use" ^{10/} is unsupportable. The quotation from Olson v. United States, 292 U.S. 246, 255 (1934), at page 33 of appellant's brief is a complete answer to this. See also the many cases on this point listed in 20 Modern Federal Practice Digest, Eminent Domain, Sec. 134, pages 521-524. The effort to find an "economic" point of view in "profitable" and a "conservation" point of view in "best" overlooks the fact that in federal eminent domain valuations the sole end sought is "market value." United States v. Miller, 317 U.S. 369 (1943); Olson, supra, pp. 246, 257. Indeed, it is nothing nobler or baser than the price which would result from "the haggling of the market." Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949). This gives compensation fair to both parties. The "most profitable use," stated in Olson, means "the best economic use" to assure reaching the full fair market value.

The district court correctly instructed the jury in that respect. It said (R. 1680-1681):

^{10/} If "best use" could be considered not to be the "most profitable use" the rule urged would operate to the benefit of the Government, not landowners.

In using fair market value to assist in determining just compensation, the test is not the value of the property for any such purpose; it is the fair market value of the property considered in the light of all the purposes to which the property is naturally adaptable both before and after the taking. It is the highest value in terms of money which the property will bring at the two points of determination, namely, before and after the taking if exposed to sale for cash at each of those two moments in the open market in the community in which the property is situated with a reasonable time to find a purchaser buying with full knowledge of all of the uses or purposes for which it is adapted and for which it is being used, the seller being fully informed and not being required to sell and the buyer being fully informed and not being required to buy at that time. In this sense, the phrase, "Market value," is synonymous with "actual value."

In fixing the fair market value of the lands in question you may and should consider the highest and best use to which this land was adaptable at the time of taking. By the term, "highest and best use," as used in determining market value, we mean the highest and most profitable use for which the property is adaptable and for which there is a demand in the market considerable enough to influence its market value. The property's highest and best use does not depend on the use to which the Defendant-Owner, Scott Lumber Company, may have devoted this land at the time of taking, nor upon the plans that it may have envisioned for this property.

It was the opinion of the Government's witnesses that the highest and most profitable use of this land was a sale for immediate harvest. They were entitled to believe this and to testify to that effect. There is no basis for requiring them (Br. 35-37) to testify on the basis of a "sustained yield" concept which they expressly did not believe would produce the highest market value (cf. Tr. 248-249). But even so, if appellant believed that the jury should have been instructed otherwise or more fully (Br. 22-23 35-37), it should have requested such an instruction. Rule 51, F.R.Civ.P.

3. Use of the Special Service Roads. Appellant asserts that the district court erred in not commenting on or striking the testimony of the Government's valuation experts because they assumed incorrect facts concerning appellant's allowable use of the new roads (Br. 37-40). The thrust of this contention is that there is a conflict between the written terms of the Special Use Permit (under which appellant will use the new roads), providing for termination "at the discretion of the Regional Forester or the Chief, Forest Service" and that the "road shall be open at all times to the free use of the public," and the testimony of the Government's witnesses to the effect that there would be very little change

in the utilization of the road from that existing before. Again, appellant's objection comes late. There was no motion made to strike the testimony on this ground and no request for comment or instruction to the jury.

But, even so, there is no merit to the point. The terms of the Special Use Permits were put in evidence for the jury to consider -- by the Government (Exhibit 3; R. 237, 240, 1204). The Government's witness, Stathem, Forest Supervisor of the Shasta-Trinity National Forests, merely explained how the terms of the permits had been construed and applied and how he was applying them (R. 1123-1235). Appellant's counsel cross-examined him extensively on this subject (R. 1194-1232). Mr. McArdle, Chief of the U.S. Forest Service at the date of taking, and Mr. Peterson, Assistant Secretary of Agriculture, also testified (by deposition) as to the purposes and applications of the terms of Special Use Permits (R. 1237-1244). The Government's valuation witnesses took all of this (the permits, the past experience and the present official intentions as to the future) into account in forming their opinions of value. There was no error in this. Indeed,

that was precisely what they should have done in seeking to fix the price which a hypothetical buyer and seller would agree upon. They were all valid considerations for appraisers and for the jury. The matter was correctly put in its proper perspective by the court in its instructions to the jury (R. 1684):

In spite of the fact that the evidence shows that as of May 18, 1960, the Government had made a determination that no charge would be made to Scott Lumber, its successors or assigns for any part of the construction cost of the new road as it might be charged to the timber taken from Section 31, this does not mean that the Government could not at a later date change its policy in this regard. You must take this possible change -- you may take this possible change of policy into account in determining fair market value, that is, you may consider this possibility if you reach the opinion that a prospective purchaser, while he was reaching a decision as to the fair market value of Section 31 after the take as of 12:01 p.m., May 18, 1960, might consider it reasonably probable in the foreseeable future that there would be such a change.

III

THERE WAS NO ERROR IN THE COURT'S
INSTRUCTIONS TO THE JURY

Appellant's variety of statements and charges on this subject in the last two points of its brief come to nothing (Br. 40-42). Thus, appellant complains that "in commenting on the evidence the Trial Judge referred only to the testimony of Defendant's valuation experts" (Br. 40). The answer is that at that time, having just granted a motion to strike their valuation opinions, that was the only proper subject for the court's comments. Appellant states that the remarks were "so inflammatory" that its counsel "immediately objected" (Br. 40). Counsel did promptly object, but to the "rulings," not to the remarks as such. The court very fairly replied for the jury to hear (Tr. 1669): "Very well. Mr. King has stated it and I don't think I could state it any better than that. He has taken exception to my rulings and he has a perfect right to do so representing Scott Lumber Company, and those exceptions are in the record."

Appellant explains "the feeling" of the jury as a result of the striking of the opinion valuation of its witnesses ("castigation") and uses the court's instruction concerning the burden of proof and weight of the evidence as a matter which "enhanced and fed" that feeling (Br. 40). We submit that the court's remarks plainly did not castigate appellant's witnesses, but merely explained in objective terms the reasons for striking their testimony (R. 1662-1668). For example, the court said (R. 1666): "Now, this does not mean that the rest of Mr. Wall's testimony may not be considered by you and given whatever weight you feel it deserves in light of other instructions I may give you. And, further, I want to instruct you that I do not mean to impugn Mr. Wall's integrity in any way that he was trying to put something over." The court's instruction that the burden to prove the amount of compensation was on the landowner and his definition of weight of the evidence were purely routine, required, and wholly correct (R. 1681). United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 273-274 (1943).

Appellant complains of "the timing" of the court's remarks striking the valuation opinions "just before the instructions" (Br. 41). The "timing" was merely that the court ruled on motions by both parties to strike certain testimony made at the end of the trial (R. 1520-1612, 1693). There was nothing for the court to rule on prior to that (R. 1693). While it is true, as appellant says (Br. 41), that valuation was the only issue in the case at this time, it is not true that all testimony of all its witnesses were thus stricken. There was a great deal of appellant's testimony concerning description of the property, quantity and quality of timber, location of markets, market conditions, logging practices, past and prospective uses of the property, etc. (in addition to its cross-examination of the Government's witnesses) which was not removed from the jury. The jury did not arrive at its award in the amount testified to by one of the Government's witnesses in "a very short time" (Br. 41). It deliberated for nearly six hours (Reporter's Transcript on Motion for New Trial, p. 103).

Appellant's last point (Br. 41-42) urges error in the failure of the court to instruct the jury along the lines

of the rest of the argument in its brief which we have heretofore dealt with. We have shown that the positions taken by appellant lack merit and, hence, any instructions based on them would not have been correct. In addition, we have shown that appellant's failure to request or object to instructions prior to retirement of the jury is clearly fatal to its present attempt to urge error in these respects. Rule 51, F.R.Civ.P.; Christensen v. Trotter, 171 F.2d 66 (C.A. 9, 1948); Southern Pacific Co. v. Villarruel, 307 F.2d 414 (C.A. 9, 1962). As this Court said in Bock v. United States, 375 F.2d 479, 480 (1967):

Rule 51 provides that a party may not complain of the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection. * * * and it is firmly established in this circuit that "the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused." Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), cert. denied, 365 U.S. 816 (1961); Hargrave v. Wellman, 276 F.2d 948 (9th Cir. 1960).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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JULY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

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No. 20,993

In the
United States Court of Appeals
For the Ninth Circuit

SCOTT LUMBER COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

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In the
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Appellant's Reply Brief

QUESTIONS PRESENTED

The Government appears to disagree with Appellant as to the questions to be presented on this Appeal, although it has not appealed. On the contrary, the Government attempts to shape and trim the questions for consideration on this Appeal in a form favorable to it (Br p.2).^{*} Rule 18(3) of this Court does not require "Specifications of Error" to be stated in an appellee's brief for obvious reasons. However, in the pursuit of its unorthodox approach, the Government has set forth its own versions of the "Questions Presented" (Br p. 2). The first two errors stated by the Government merely paraphrase the first two given by Appellant in its Brief as required (Op.Br p.5). The remaining two errors specified by the Government hardly resemble the four additional errors specified by Appellant (Op.Br pp.5-6), and so the Gov-

^{*}Throughout this Reply Brief, Appellant's Opening Brief will be referred to as "Op.Br" and the Government's Brief as "Br".

ernment Brief is in these particulars not a reply to Appellant's Brief and argument, but rather in support of its own notions as to what this Court should consider.

STATEMENT OF THE CASE

Also, no Statement of the Case is required of Appellee in its brief "unless that presented by the Appellant is controverted." Yet, without challenging any part of Appellant's Statement, the Government devotes six and one-half pages to its own Statement (Br pp.3-9) and converts it into a preliminary argument. Since the Government Brief was prepared 3,000 miles from the site, a lack of familiarity with the territory as well as the Record, has made this Statement justifiably suspect. For example, the existing roads which are some twelve to sixteen feet in width were not built by the Forest Service in the years 1929 and 1930 as stated. On the contrary, Mr. Stathem was testifying in the passage referred to as to the condition of the roads just prior to May 18, 1960 (R 1152), at a time when they were fully and completely owned by Appellant, Scott. Prior to 1950 the Government had built fire trails in this then unopened territory (R 68, 78-80). These fire trails were improved and made over by Scott into prudent operator's logging roads suitable for the harvesting of timber (R 1153, 79) and were used successfully by Scott and others for this purpose (R 78, 20-21, 99, admitted Br p.4).

The condemned right of way did include the existing roads plus additional strips at either side for widening the roads for "safety" (Br p.3). See Appendix A Op.Br. Mr. Stathem at the beginning of his testimony frankly stated (R 1155) that the widening of the road:

"Will take care of *off-highway* loads* and enable a logger to proceed on this road with a safe speed of 30 miles an

*Off-highway loads are those which are too wide and too heavy for California public roads and are prohibited for use on highways by the Motor Vehicle Code. Only one logger uses the prohibited vehicles—Lorenz Lumber Co.

hour as contrasted with the 20 miles an hour road system that was there before."

The reason for widening the roads for "safety" was unequivocally stated by Mr. Toler to have been generated by the over-sized, off-highway trucks of Lorenz, and even this did not provide the necessary safety: (R 216-217)

"THE COURT: Can't we establish—I am quite curious to know what kind of a road is this. Is this a single width road, this road that extends out to the east from Section 31 on this County Road, is this a single width road or is it a double width road?

"THE WITNESS: In portions it is double width. Other portions, I'd call it about one and a half with passing lanes. Several of the trucks using the road are ten foot bunk or twelve foot. I believe most of them ten. They use that cheese block, which is a small triangular stake, and the logs are placed at the end and the log would extend at least another foot and a half on out past that. So the total width of your truck loaded would be in the vicinity of twelve, maybe thirteen feet, where our trucks for the Company all have to go on highways and you are only allowed by the Motor Vehicle Department a total width of eight feet. If we extend beyond that we are in violation of the law. So these trucks carry two and a half times to three times what our highway trucks do because of the off-highway haul to this Lorenz Mill. They are not an object that can pull over on a blind turn such as the turns going into this Section 31, because it is quite a twisty road, and with the weight behind them and the grade, and if the road has been recently watered it is slick, it would be impossible to pull that truck over if a fire truck is coming or any other vehicle. So the other vehicle would just have to give or you'd have a head-on crash of which in the past there has been two or three crashes between vehicles or between logging trucks."

While this testimony was given with respect to the highway connecting between the county road and Sec. 31, it established that safety and speed could not be attained by merely widening the road for Lorenz over-sized trucks. Lorenz is the only logger using highway-illegal trucks. This testimony was never refuted.

The condemned roads gave no additional access to Government lands than before as there had always been free access to Government timber land over Sec. 31 (R 1153). It is true that Mr. Stathem stated in righteous terms that the widened road was necessary for "unrestricted competitive bidding" (R 1148), but Mr. Toler's testimony shows that this purpose was not the fact, and further does not effect any safety, but on the contrary results only in an unfair preferential treatment to the only bidder, Lorenz, with over-sized highway-illegal trucks which are dangerous under any circumstance.

The remainder of the arguments of the "Statement of the Case" will be responded to appropriately under the points as they arise in the Argument.

ARGUMENT

Summary Judgment

The gravamen of the Government argument in support of the Summary Judgment is that if the pleadings state that the taking of private land from private ownership is for a public purpose, then this statement alone makes the taking incontestible in the courts. This is said to be true even if facts alleged in opposition to the taking are to the contrary and the taking itself is contested on this ground (Br pp. 14-15). The facts alleged here show that the taking was unnecessary and wasteful for there was already a satisfactory road system available (R 59) and in existence without cost, that there was never any denial to anyone of access to Government timber land over the existing road system (R 59) and that the Forest Service, the Watt Interests and Lorenz

were engaged in a conspiracy to deny Government timber to Appellant Scott behind the sham of "free competitive bidding."

Lorenz now has, and had at the time of the condemnation, an agreement with the Watt and Lamm Interests and the Forest Service to build the roads through Sec. 31 and charge for the use thereof, in the removing of Government and Watt interest timber (T 32). The gaining of control over the private roads of Sec. 31 was first attempted by negotiation of the Forest Service and Lorenz (T 33-38). Failing in these negotiations the Forest Service brought condemnation (T 39). Even though no written agreement was signed between the Forest Service, Lorenz and Watt, it was admitted that the discussions became the agreement (T 68).

Solely for the purposes of carrying out this private agreement the Forest Service at a single stroke by condemnation secured the control of the roads, gave an enormous bidding preference to Lorenz alone, and destroyed Appellant's timber management of Sec. 31 which is its own private property. No matter how pious the words of the taking are expressed, it is submitted that these results show mere caprice and arbitrary action in bad faith by administrative officials responsible for the condemnation.

If such matters cannot be questioned and determined by the Courts "but relate, rather to forest management purposes which are matters exclusively for the Forest Service" (Br p.6) which is the power to cripple and destroy the private timber industry, then indeed we have become a land of tyranny by men instead of justice through law.

The Government attempts to sidestep the real issue on the right to Summary Judgment under Rule 56(c) FRCP, i.e., that Summary Judgment is not to be granted unless there is no genuine issue as to any material fact, and the Government entitled to Judgment as a matter of law. It does appear that where the facts alleged, if proved, would show the taking was arbitrary, capricious and a violation of private rights, genuine issues of material facts

are raised. In making the Order (T 153-159) which was arbitrarily converted into Summary Judgment (T 160) the Trial Court stated: (T 155)

“The facts alleged by Scott, taken in the light most favorable to Scott, do not show that the action of the officials has such an arbitrary, capricious, or bad faith quality as to justify interference by this Court.”

The Court not only recognized that there were genuine issues of fact, but weighed them in concluding that they were not of sufficient intensity to justify interference. In such a circumstance it cannot be fairly asserted by the Government that there were no genuine issues as to any material facts. The granting of Summary Judgment was error, and Appellant should not have been denied the opportunity to prove its defenses.

The District Court's Failure to Abide by and Adhere to the Pre-Trial Order Is Inexcusable

The Government Brief devotes very little space to this point (Point 2, Op. Br pp. 5,14) except for a restatement of some of the facts (Br. pp. 21-23). The Pre-Trial Order (T 194-6) stated unequivocally that title to Sec. 31 was in fee simple in Appellant, subject to a specific easement in favor of the Watt Interests, and for which they disclaimed any further interest and in the amount to be awarded. These facts were to govern without the necessity of proof at the trial. The Pre-Trial Order was not something dashed off informally and without full consideration. On the contrary, it was prepared by the Government after conferences with both the Court and Appellant's then counsel, Gregory S. Stout, Esq. (See Appendix B herein*) It was the culmination of negotiation. In return for the Government's recognizing Appellant's title in fee simple, subject only to the easement of the Watt Interests,

*In preparing the Transcript the Clerk omitted items (ii) and (iii) of the Second Supplemental Designation and the same are reproduced in the Appendix at the end of this Brief.

Appellant agreed to accept the timber valuation urged by the Government (T 195). The Pre-Trial Order accordingly contained both of these concessions.

Appellant vigorously challenges both the legality and ethics of the Government by surreptitiously persuading the Trial Court to adopt the portions of the Pre-Trial Order favorable to it but ignore the portions unfavorable. One can understand how the Government, upon second thoughts, might have considered it had made a bad deal and then asks to be excused from the entire Pre-Trial Order. But this it did not do.

However, the attempt to sustain this trickery, especially in the light of the Affidavit of Gregory S. Stout, Esq., a respected member of this Court, simply aggravates an unseemly situation, and certainly is not the conduct expected from the Government.

Upon the motion for a New Trial the Trial Court, too, was hard put to justify the departure from the Pre-Trial Order without protecting Appellant. It was forced to go outside the Record to rely upon matters which are *not in the record* (R 248), are not now before this Court, and which are disputed.

The Government seeks to exculpate itself by asserting that there was no objection at the time of trial to its conduct. Mr. King, who represented Appellant at the trial, was wholly unaware of the situation and had simply relied upon the Pre-Trial Order in good faith in the preparation of this case. He could not have known, or even been aware of the trap which was to be sprung on him during the presentation of the Government's case. And, lacking experience, as both the Court and Government well knew, he appears to have tried to continue with the case instead of risking, what to him, must have appeared to be the wrath of the Court by impugning the *bona fides* of the Government's defense.

It is likewise no answer to say that the Pre-Trial Order does not state that the Watt easement was the *only* encumbrance. This merely compounds the bad faith which now must be considered

deliberate (see Affidavit of Gregory S. Stout). Title to Sec. 31 was an issue in this case and this issue was determined by the Pre-Trial Order and removed from further consideration of this issue during the trial, except in accordance with the provisions of Rule 16, F.R.C.P.

The error is admitted in that the Pre-Trial Order was not adhered to (T 247) and the Government's attempt to now explain it away is sophistry. Indeed, the present situation illustrates most forcefully why a trial court should not, *ex parte*, deviate from the Pre-Trial Order, without, at least, making clear to the aggrieved party that a variation is being sought by the opposition and affording the aggrieved party the right to realign to meet the new situation. The mischief worked here by an unscrupulous Government coupled with an insensitive judge and inexperienced counsel could easily be avoided if trial courts are required to abide by Federal Rule 16.

The Government in its Brief makes no effort to deny that there was a departure from the Pre-Trial Order. It states only that "The district court did not erroneously disregard the pretrial order." (Br p.10),—that there was no error in so doing.

The Insufficiency of the Valuation Testimony of the Government Witnesses Remains as Error

The introductory paragraphs of the Government Brief on this point (Br p.15) are an attempt to gloss over what Appellant considers and has stated as the strident attitude of the Government in this litigation (Op. Br p.43). In justification, only a self-serving statement of Government counsel is referred to. Quite naturally he would do everything to justify his conduct. So far as the victim is concerned, the execution is not made any more acceptable or less final merely because the executioner is pleasant about it and smiles a little.

(a) *The California Forest Practices Act*. A fundamental error which the Government valuation witnesses, Howell and Linville, made in arriving at their conclusion as to value was their failure to consider the Forest Practices Act of the State of California. Sec. 31 is private land and the cutting practices are governed and controlled by the laws of the State of California—not the U.S. Forest Service. There is not one line of evidence to show that either Howell or Linville, the Government valuation witnesses, considered the cutting practices required by the state law in giving their valuation opinions. Neither one was familiar with the practices required of a logger or a timber management operation (Howell, R 1325; Linville R 1445-6), and therefore they cannot be assumed to have known about, or had any experience with the California Law on this vital subject.

The argument made by the Government is largely one of semantics. The Brief criticizes Appellant's use of the term "cut out and get out" as being coined by Appellant's counsel (Br p.24). Counsel did not dream up this phrase. It is one used commonly throughout the industry and has been used for many years to mean precisely what the Government witnesses Howell and Linville, had in mind when they admittedly stated that the property was appraised on the basis of a "full cut or immediate harvest" (Br p. 25).

"Clear cutting means to cut the timber indiscriminately without reference to its size or merchantability. This practice is in violation of the California Forest Practices Act."

There was not one line of testimony in the entire Record to show that "full cut" and "immediate harvest" mean anything other than clear cutting.

Howell stated on direct examination that: (R 1299)

" * * * the highest and best use of this property from all of the information that I could gather of a single section of land that was owned by Scott Lumber Company was for

the immediate harvest of the timber that was on that property.”

He then considered the value of the land without the timber and stated with reference to sales of cut over timberland: (R 1299)

“These assisted me to estimate the market price that this property would be sold for, that is, the cut over timber land value, and considering what these had sold for, * * *”

Howell had managed only his own cut over land and when asked to explain the harvest of the timber on his land, stated: (R 1326)

“Well, the land in my own case was fenced pasture area, so it could possibly be given additional light into the area for additional grass growth.”

And again, on cross-examination Howell stated: (R 1366)

“I think that the greater percentage of the buyers of this section of land would most likely harvest the timber to get away from the risk that he would have of fire, the risk that he has of not having a road which would be available to him unless there was a Forestry road that was going to be built in there, to get his money out. In other words, he has got a big investment in the purchase of this property, and the way to salvage that investment, besides making some money, is to get in while the market is strong. He had no guarantee that the market was going to be strong a year from that time or five years from that time or ten years from that time.”

Linville stated: (R 1409)

“I concluded that as of May 18, 1960 the highest and best use of this property, that is, the use which would bring the highest price if it was offered for sale in the open market under the terms of fair market definition, would be to sell it to someone who would cut the timber off as quickly as they could.”

How fast is quickly? Linville stated one or two seasons (R 1438, 1464)

Neither Howell (R 1335, 1352) nor Linville could find any property comparable to Sec. 31 upon which to base a value. It is beyond dispute that the only property which either of them used to make a comparison was cut over timber land (R 1307-1309; 1453). The magnitude of the error of ignoring those portions of the Pre-Trial Order favorable to Appellant are here apparent. If Appellant had been able to treat the Sec. 31 as timbered land, instead of having the timber value separately decided in advance (as was agreed to in the Pre-Trial Order), the Government's experts would not have been qualified. Yet when Appellant's experts relied upon the Pre-Trial Order by treating the property as owned by Scott, subject only to the Watt Interests' right of access, they were bitterly attacked by the Government and the Court for being remiss and omitting key facts. Typical of Howell's view of cut over timber land is his testimony: (R 1350)

"No, it was a property that had been cut over so there were roads back in through the hills like there would be with any timber harvest * * *"

Linville stated that his investigation showed (R 1422)

"* * * there was a good market for cut over land."

In response to a question as to whether the cut over property which he has used as comparable, had a road system which could be used as such, Howell stated: (R 1351)

"I do not think it did as such. I think that a small property like this more than likely they would move into one spot and harvest the whole thing from one setting."

Linville was very clear as to what he meant by cut over timber land: (R 1455)

"I think that the market is representative generally of properties throughout the area. A purchaser of Section 31 would log it, and then he would have cut-over timber land

he could do what he wanted to with, he could either sell it to somebody for some other purpose, or he could retain it for his own use."

Their testimony is replete with such statements which can have no other meaning than "clear cutting", and that their opinions were based upon "clear cutting" which is admitted by the Government to be a violation of the California Forest Practices Act.

The attempt of the Government's Brief to explain away the obvious disqualification of the valuation opinions was that both witnesses relied upon the Bunting timber cruise. The Bunting timber cruise was never accepted as accurate by Appellant, Scott. It related only to the timber in the area which was condemned for use as a road (R 1258). All of that timber had to be clear cut because in making a road it is impossible to leave any trees growing, no matter what size, and still have a usable road. The clear cutting of the Bunting cruise was used by both Howell and Linville in formulating their valuations (Howell, R 1258, 1299; Linville, R 1407-1408).

Appellant does not dispute that Mr. Stathem testified that the timber of Sec. 31 could be cut down to the allowable limitation within the State Practices Act, but he was not a Government valuation expert. He was a Government Forester who knew and was supposed to know, what the allowable limitations were, but such knowledge cannot be imputed to the Government valuation witnesses who were not experts in forestry and did not take these limitations into consideration with regard to clear cutting.

Another limitation which the Government Brief attempts to insert in the testimony is that immediate harvest or full cut as testified, included only "merchantable" timber (Br p. 25). There was not one line of testimony to support this and as has been indicated above, the whole valuation testimony of Howell and Linville belie this clever attempt to hide the facts. Furthermore, it seems clear that if a full cut and immediate harvest,

as testified to by the Government valuation witnesses, meant something other than that which they each stated, then the Trial Judge should have been alert to protect Appellant as well as the Government, to make this clear in his rulings on the evidence and in the instructions to the jury that "full cut" and "immediate harvest" included only "merchantable" timber. Obviously, this was not done. Thus, the total disregard of the California Forest Practices Act in arriving at a valuation is a fundamental error of such proportions that the valuation opinions are useless and should have been stricken.

The same standard should have been applied to strike the valuation opinions of the Government experts for failure to consider this vital matter which made their opinions valueless.

(b) *The Most Profitable Use* The response to Appellant's analysis of the Record showing that the Government valuation witnesses based their testimony upon the highest and most *profitable use* instead of the highest and *best use*, is characterized as a "quibble" (Br 25). If words are to mean anything in the communication of ideas, then "highest and most profitable" use cannot mean identically the same thing as "highest and best" use. Profitable use involves a speculation as to further events, including markets, costs, and all other elements involved in the accounting and economics for the determination of profits. The speculative aspects of profitable use were recognized by Howell (R 1366). It includes such intangibles as the amount of effort and the kind of effort that is put into the venture. It also involves know-how applied to the effort. All of these are factors of economics and accounting which are taken into consideration, balanced with one another and then only is it determined whether or not a profit or loss has resulted. Neither Howell or Linville were accountants nor in any way skilled in accounting procedures, and in fact, neither one had had any experience in economics or in the opera-

tion of the lumber business. There was just no way for either of these men to determine "the most profitable use" of Sec. 31, and when they were testifying as to the most profitable use they were speaking as laymen and their opinions were wholly improper. This is especially true in the light that Appellant's witnesses Berry and Toler, who have had years of experience in the lumber industry, both testified that the highest and best use of Sec. 31 was timber management—conservation of this resource. The highly experienced Mr. Stathem agreed until the Government attorney influenced his testimony. (Op. Br pp. 29-30)

It is submitted that the quotation from *Olson v. United States*, 292 U.S. 246, 255 (1933) (Op. Br p. 33) is a complete demonstration that "highest and most profitable use" is *not* the equivalent of "highest and best use", but that profitable use is merely one factor in the determination of market or actual value. To permit valuation witnesses to testify as to profitable use when they are not qualified to discuss such economic and accounting matters, makes their testimony wholly improper. Their valuation opinions were thereby rendered useless.

(c) *The Mythical Prospective Purchaser* Appellant has demonstrated that in arriving at their figure of a fair market value both of the Government witnesses, Howell and Linville, considered only the buyer who owned no timber land and therefore was interested only in clear cutting, getting a profit if he could, and getting out, to the exclusion of any other type of buyer (Op.Br p.35). The Government makes no response to this point, and it is assumed therefore that this is conceded.

The exclusion of one class of buyer or the consideration of a single class of buyer is error which cannot but discredit the valuations of the Government witnesses and make their testimony improper, and valueless.

(d) *Special Service Roads* The Government's Brief (p. 28) notes the direct opposition between the written terms of the

Special Use Permit for the use of Government owned roads and Mr. Stathem's testimony in which he: (Br p. 29)

"* * * merely explained how the terms of the permits had been construed and applied and how he was applying them."

It is beyond dispute that Mr. Stathem was not acting in accordance with the express terms of the written agreement with the user and that this practice of personal interpretation could come to an end at any moment without prior notice. Also, that the Government could repudiate Mr. Stathem's personal and improper interpretation and hold the user to the exact language of the written agreement. It seems elemental that under these circumstances the written agreement must take precedence.

It is said (Br p. 30) that the matter was put correctly in its proper perspective by the Court in its instructions to the jury (R 1684). This instruction refers to charges to be made against a user for the use of the road. It has nothing whatever to do with the provisions of Special Use Permits requiring that the road shall be open at all times to the free use of the public. In making the assumption based on Mr. Stathem's testimony that a road, such as the condemned roads operating under Special Use Permits, could be closed at the will of either the user or the local Forester, is just not in accordance with the written Special Use Permits. There is no dispute that the valuation witnesses of the Government relied upon Mr. Stathem's testimony rather than the written terms of the Special Use Permits, which are exactly contrary. This is one more example of the basic inaccuracies of the Government valuation witnesses which makes their testimony unreliable. Since Appellant's valuation witnesses' testimony was stricken because of claimed factual insufficiencies, the same rule should have been applied to the Government witnesses, and their valuation testimony stricken.

The Court's Error in Striking the Testimony of Defendant's Valuation Witnesses, Sanders and Wall

In attempting to reply, the Government Brief fails to comprehend the nature of this error.

A facet of this point is that Wall's testimony was stricken because in giving his evaluation he did not consider the so-called Southern Pacific easement, which, it will be remembered, had been excluded from the trial by the agreement of the Pre-Trial Order. This portion stands or falls upon the determination by this Court as to whether or not a Pre-Trial Order means something, or can be ignored at will, in violation of Rule 16 F.R.C.P.

A second facet to this point is that the Trial Court repeated the denunciation of Defendant's witness Wall on the ground that he failed to consider the Southern Pacific easement, as shown by the numerous Record references in the Government's Brief (p. 17). However, the striking of the testimony was actually delayed and the comments with respect to this evidence made at a most critical time in the trial, which was just before the instructions to the jury. This resounding and devastating attack upon Appellant's witnesses was the last thing presented to the jury before the instructions and could not have done other than wittingly or unwittingly shape the pre-judging of Appellant before the jury. This Appellant submits is the prejudice which demands a reversal of the Judgment.

A third facet of this is the emphasis given to Appellant's position and the failure to even mention the Government's comparable position. Appellant believes that the Trial Court had a right to comment upon the testimony, but it states that this comment should be fair. It also means that the comment should be applied to both parties equally and not just to one party, as was done here.

It is for all of these reasons that the conduct of the Trial Court is believed to be reversible error.

The Error with Respect to the Instructions to the Jury

Appellant is fully aware of the provisions of Rule 51, F.R.C.P.:

“No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

As will be noted from the Record, no particular Instruction was alleged as error. The Appeal was not taken on the ground of the giving or refusal to give any particular Instruction. This is not the basis of the Appeal. The issue on this point is that regardless of the instructions given or refused, the Court is under a duty to make certain that the instructions are proper. It is Appellant's position that with respect to the determination of the highest and best use, this meant the highest and best *legal* use, and that a court in making an instruction contrary to the laws of the State of California is error *per se*. It is also Appellant's position that the failure by inexperienced counsel to object to the giving of an instruction, or the failure of such counsel to ask for a proper instruction, does not excuse the Court from making sure that the instructions given are proper and adequate. After all, the attorney has no real control over what instructions are given, and that this is primarily the responsibility of the Trial Court. Failure in this responsibility is the error for consideration on this point. It was this failure that led to the miscarriage of justice.

CONCLUSION

Appellant believes that the opportunities afforded in filing this Reply Brief have greatly clarified the respective positions of the parties and simplified them to a point where the errors are fully apparent. It is further believed that Appellant has completely sustained its burden of showing the errors and that the Judgment of the lower Court must be reversed.

Respectfully submitted,

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A certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY GIFFORD HARDY

(Appendices Follow)



Appendix A

*In the United States District Court for the Northern District
of California, Northern Division*

Civil No. 8095

20993

United States of America,

Plaintiff,

vs.

23.5727 Acres of Land, more or less, in the
County of Shasta, State of California; Scott
Lumber Company, Inc., a Corporation,
et al.,

Defendants.

SECOND SUPPLEMENTAL DESIGNATION OF THE RECORD ON APPEAL

In designating items for the Record on this Appeal, two items were inadvertently overlooked. Accordingly, the Clerk of the District Court is therefore requested to certify and send forthwith the following two items to the Clerk of the Court of Appeals for the Ninth Circuit at San Francisco for inclusion in the Record on Appeal:

- (i) The Amended Motion to Alter or Amend the Judgment filed February 12, 1965.
- (ii) The Affidavit of Gregory S. Stout, Esq., filed May 6, 1965 in support of the Motion for New Trial.

(iii) This Second Supplemental Designation.

HENRY GIFFORD HARDY

Henry Gifford Hardy

ALFRED B. MCKENZIE

Alfred B. McKenzie

Attorneys for Defendant

Scott Lumber Company, Inc.

WILLIAM E. ROLLOW

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the above Second Supplemental Designation have this day been mailed to Charles R. Renda, Esq., Assistant United States Attorney, 16th Floor Federal Building, P.O. Box 36055, 450 Golden Gate Avenue, San Francisco, California 94102.

HENRY GIFFORD HARDY

Henry Gifford Hardy

Dated: June 7, 1966.

Appendix B

*In the District Court of the United States for the
Northern District of California Northern Division*

Civil No. 8095

United States of America,

Plaintiff,

vs.

23.5727 Acres of Land, more or less, in the
County of Shasta, State of California; Scott
Lumber Company, Inc., et al.,

Defendants.

Affidavit of Gregory S. Stout on Behalf of Defendant's Motion for New Trial

Gregory S. Stout, being duly sworn, deposes and says:

1. That he is an attorney, licensed to practice in the Courts of the State of California and United States, and maintains offices at 220 Bush Street, Suite 360, San Francisco 4, California.

2. That he was attorney for Defendant, Scott Lumber Company, Inc., for a period of several years and participated in the negotiations between Scott and the United States, Division of Forestry, Department of Agriculture, in connection with the above entitled action, at many meetings with representatives of the Government in Redding and San Francisco. In attempting to negotiate the disposition of the case, no mention was made of any claim of easement asserted by the Southern Pacific Company.

3. He represented the Scott Lumber Company, Inc. at the Pre-Trial Hearing before Judge Halbert on July 13, 1964. In view of the fact that Southern Pacific Company had filed a disclaimer,

no mention was made of Southern Pacific Company's position in Pre-Trial memoranda filed by any of the parties. The sole concern of the parties related to the interest of Watt and Lamm at the Pre-Trial hearing. Through their then attorney, Daniel S. Carlton, a statement was read which indicated to the Court and counsel that a disclaimer would ultimately be filed. Again no mention was made of any Southern Pacific interest in Sec. 31 at the Pre-Trial Hearing. At no time was any issue raised with respect to any Southern Pacific easement or interest and so it was not included in the Pre-Trial Order.

4. The Pre-Trial Order sets forth accurately, the status of the ownership of Sec. 31 as discussed and agreed upon in good faith by counsel. There was no reason to suspect and it did not even enter his mind that anything was being withheld by the Government, in the language of paragraph (2) of the Pre-Trial Order, and he does not believe there was any intent to withhold anything.

5. In view of the fact that all defendants, other than Scott, had disclaimed and were thereby entitled to no compensation for their interests from Plaintiff in view of Plaintiff's taking, there would be no logical and legal reason for any of the experts to consider any Southern Pacific easement in derogation of Scott's position and Scott's entitlement to full compensation.

Further Affiant saith not.

Dated: May 4, 1965

GREGORY S. STOUT

Gregory S. Stout

Subscribed and sworn to before me this 4th day of May, 1965.

/s/ MARIAN S. KAYNE

[Seal]

Notary Public







